

# **On Trans-boundary Recovery and Transfer of Illicit Money and Goods between Regions of China**

SHI Yan'an\*

## **I. Introduction: the complicacy of trans-boundary recovery and transfer of illicit money and goods between Regions of China**

The recovery and transfer of illicit money and goods is one of the significant items of international and regional criminal judicial cooperation. China has contracted some treaties with certain countries on criminal judicial assistance and extradition with special provisions of transfer of illicit money and goods, but with those who we have not made any yet, the transfer of illicit money and goods can only be conducted by negotiation in each case. And this problem is also found to be a rather tough one encountered by inter-regional criminal judicial cooperation in China. On 26<sup>th</sup> April 2009, ARATS of Mainland China and SEF of Taiwan made an agreement called *Agreement of Jointly Cracking down on Crime and Mutual Legal Assistance Across the Taiwan Strait*, in which Article 9 makes an overall provision on “transfer of proceeds of crime” across the Strait; on 3<sup>rd</sup> January 2011, *These Key Points of the Investigation and Collection of Evidence and the Transfer of Proceeds of Crime cross the Taiwan Strait* published by “Ministry of Justice” of Taiwan provides the specific items of transfer of proceeds of crime. So far the mainland has not yet made any such normative files with the Hong Kong Special Administrative Region (hereinafter as “the Hong Kong SAR”) and the Macao Special Administrative Region (hereinafter as “the Macao SAR”) as with Taiwan, but cases of handling the transfer of proceeds of crime by cooperation can be found between these parties.<sup>1</sup> There are also no rules on the transfer of illicit money and goods in the *Arrangement of Criminal Judicial Assistance between the Mainland and the Macao Special Administrative Region* on the agenda.<sup>2</sup> Besides, it would also provide an indispensable way for trans-boundary transfer of illicit money and goods to establish customs (or precedents)<sup>3</sup> by making full use of existing legal resources under the principles of equality and negotiation in the circumstances of lacking normative files of criminal judicial assistance.

Compared with such inter-regional criminal judicial cooperation items as the repatriation and transfer of criminal suspects, inter-regional recovery and transfer seems to be less controversial and of less significance, yet its complicacy is beyond all doubt. It can be seen mainly from 9 aspects. First, the selection of recovery and transfer mode, i.e., how would the requesting party request to the local judicial organ where illicit money and goods locate to recover? Second, the recognition of the requesting party’s effective judgment, this will further concern the kind of the judgment, civil or criminal. If it is a criminal effective one, it would concern the tough recognition of criminal

---

\* Associate Professor, Law School of Renmin University of China

effective judgment. Third, the determination of the scale of illicit money and goods, for example, if the illicit money or goods were put into lawful investment, how do we calculate their amount? Or if they are used to conduct illegal activities, can we still recover? Fourth, the procedure the requested party chooses to conduct recovery and transfer, administrative or judicial. If judicial procedure has been chosen, which kind shall be adopted, civil procedure or criminal procedure? Fifth, if the criminal has been detained or controlled by the requesting party, while the illicit money and goods remain in the requested party's control, can the judicial organ at the requested party's side conduct the trial by default to decide the property of the illicit money and goods and the corresponding forfeiture or recovery measures? Sixth, how to recover the illicit money or goods and protect the third party's lawful rights at the same time? Seventh, during the process of recovery, how shall the enforcement authority cooperate with financial institutes? And next, can the requested party's expenses for the recovery and transfer be deducted from the recovered illicit money or goods? Finally, as to those cases which concern economic crime and violate administrative rules at the same time, if the administrative organ with jurisdiction has confiscated or recovered the illicit money or goods, shall this decision also be included in the scale of recoverable property?<sup>4</sup>

Since this problem involves a wide range of specific legal issues, both substantive and procedural, in order to solve this problem, the first thing is to make clear its basic thoughts, that is: while we are studying the existing successful cases between the mainland and Hong Kong, Macao and Taiwan, we should also deliberate over those worldwide-recognized success to establish a mode of recovery and transfer which is possible to consider various legal mechanisms and interests, or in light of the diversity of the current four legal units and mechanisms, to establish a system of multiple modes. Seeing from the current situation that the four legal units and mechanisms blend in with each other, taking the transfer mode set by the *United Nations Convention against Transnational Organized Crime*<sup>5</sup> and the *United Nations Convention against Corruption*<sup>6</sup> as a reference (hereinafter as "two Conventions"), it is reasonable to a mode of recovery and transfer of illicit money and goods that accords with the actuality and interests of the four legal units and mechanisms. And this paper is just going to develop under this view.

## II. The mode set by two Conventions

Article 12, Article 13 and Article 14 of the *United Nations Convention against Transnational Organized Crime* are 3 provisions about confiscation and the related international cooperation, among these Article 12.1 provides that confiscable property includes "Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds"; and the *United Nations Convention against Corruption* has got a special chapter providing the return of assets. Some ways and methods of confiscation, recovery and transfer (return) these two Conventions refer to can also be seen in the treaties (agreements) of criminal judicial assistance China and some other countries made.

In accordance with the *United Nations Convention against Corruption*, the methods of recovering and returning illicit money and goods mainly include "direct recovery of property" and "recovery through international cooperation in confiscation":

## **2.1 Direct Recovery of Property**

Direct recovery of property means that the aggrieved party directly puts forward his claims and requests to the judicial organ of that country where the property locates in accordance with its domestic law to recover his aggrieved lawful property. The following is 3 kinds of measures:

### **2.1.1 Recovery through filing a civil lawsuit.**

This means that a State Party that was harmed by the offences or the lawful owner of the related property files a civil lawsuit with a court of another State Party where the illicit money and goods locate to maintain and determine his ownership of the property that was illegally harmed and transferred. Article 53.1 of the *United Nations Convention against Corruption* provides that “Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention”. And this way is apparently of great advantage: the aggrieved party of property can readily find legal support and seek remedies through civil lawsuit; the standard of proof in civil lawsuit is preponderance of evidence which is favorable for the aggrieved party’s production; the aggrieved party of the property can directly and timely put forward claims of property preservation to the court; and default decision is permitted in civil action.

### **2.1.2 Recovery through civil lawsuit collateral to criminal proceedings.**

This means that the court of a State Party where the illicit money and goods locate can, in accordance with the harmed State Party or the lawful owner of the property’s claims, order the criminal defendant infringing property rights to pay compensation or damages to the aforementioned harmed state or party. Article 53.2 of the *United Nations Convention against Corruption* provides that “Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State party that has been harmed by such offences”. This provision is actually a recovery through civil lawsuit collateral to criminal proceedings. Of course, this method can also be adopted in civil action.<sup>7</sup>

### **2.1.3 Summary return.**

This means, where we are dealing with illicit money and goods or proceeds of crimes or other illegal activities, they shall be returned in the light of relevant person’s submission of certificates of lawful ownership. Summary return is featured as: first, its principal ground is the requesting State Party’s request of criminal judicial assistance, while its domestic judicial findings of withholding, freezing or confiscation are not necessarily required; second, decisions about withholding and return can be made by any organ in the requested state which is authorized to make such decisions (such as organs of criminal investigation, organs of criminal prosecution or organs of administrative enforcement of law); third, all goods which are withheld by international judicial assistance can be returned to the requesting party later. However, the aforementioned goods in this method shall not have any controversy on ownership and the return shall preserve the third party’s lawful rights, and the transfer of related goods shall not hinder the requested state’s criminal proceedings or trial of cases in progress.<sup>8</sup> Article 53.3 of the *United Nations Convention Against Corruption* provides that “Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party’s claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention”.<sup>9</sup>

## 2.2 Recovery through International Cooperation in Confiscation

Both the *United Nations Convention against Transnational Organized Crime* and the *United Nations Convention against Corruption* have got the article of "International cooperation for purposes of confiscation". The subject matter of confiscation is "proceeds of crime", and subject to Article 2(e) of the *United Nations Convention against Transnational Organized Crime*, "'Proceeds of crime' shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence". In accordance with Article 12 of that Convention, proceeds of crime also have 3 transforms: one is substitution proceeds, i.e., "proceeds of crime have been transformed or converted, in part or in full, into other property". Another is intermingled proceeds, i.e., "proceeds of crime have been intermingled with property acquired from legitimate sources". In this case, "such property shall...be liable to confiscation up to the assessed value of the intermingled proceeds". And the third form is benefits of proceeds, i.e., "Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled". In this case, it shall be dealt with "in the same manner and to the same extent as proceeds of crime". In light of different legal measures, recovery through international cooperation in confiscation can be divided into two cases:

### 2.2.1 Criminal forfeiture or civil forfeiture in the country where property is situated

Article 54.1.2 of the *United Nations Convention against Corruption* provides that each State Party shall, in accordance with its domestic law, "take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offences as may be within its jurisdiction or by other procedures authorized under its domestic law". Such kind of forfeiture through criminal proceedings is usually called criminal forfeiture. It is conditioned as: first, the suspects or defendants and illicit money and goods of crime are in the country where the illicit money and goods were transferred in (i.e., the country where the property is situated). Second, the related person have done such activities as laundering, fraud or smuggling which violated the law of the country where the property is situated when they were transferring the illicit property, or committed other crimes or economic activities that shall lead to forfeiture in that country. In the case of criminal forfeiture, competent authorities in that country initiate criminal procedures against relevant person completely in accordance with its domestic law.

Article 54.1.3 of the *United Nations Convention against Corruption* provides that each State Party shall, in accordance with its domestic law, "consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight, or absence or in other appropriate cases". Since such kind of forfeiture has no correlation with criminal conviction but takes property as its sole aim, it is called "civil forfeiture".<sup>10</sup> The greatest advantage of civil forfeiture is its success in separating person from goods, which enables the recovery of proceeds of crime to free from judicial jurisdiction and trial of criminals. The discrepancy between criminal forfeiture and civil forfeiture is obvious. The former is a punishment toward a convicted individual of a certain crime, thus its procedures are in personam; while the latter is filed aiming at the property of "invasiveness" and it is in rem. Their distinction mainly can be seen from 3 aspects<sup>11</sup>: (1) Distinction in grounds. Criminal forfeiture must be on the ground of guilty verdict, while civil forfeiture does not depend on criminal adjudication, only if the property to be confiscated is

deemed as of the liability to be repeatedly illegally used and this illegal use can be proved. For example, if a car was used to carry illegal narcotics and is withheld, the owner was prosecuted and charged of drug crime, then he was decided not guilty, but this decision would not affect the civil action that was filed independently against that “guilty” car. (2) Distinction in standard of proof. The standard of proof in criminal forfeiture is “to exclude any reasonable doubt”, because forfeiture is a part of measurement of penalty, and the prosecutor must prove that the defendant’s criminal responsibility has been up to this standard before criminal forfeiture. But in cases of civil forfeiture, the standard of proof adopted is preponderance of evidence, relatively low. Obviously out of practical needs, the prosecutor is of greater advantage in civil action in rem. (3) Distinction in calculation of forfeiture time. “Personified presumption” (to decide whether the property itself is lawful or not) is applied in civil forfeiture, i.e., if the property is illegally used, it is “guilty” and can be confiscated; while criminal forfeiture is in personam, thus guilty verdict is its ground.

### **2.2.2 Recognition and execution of foreign decision of forfeiture**

Recognition and execution of foreign decision of forfeiture means that the requesting state’s decision of forfeiture is endowed with legal effect of domestic execution by the requested state, and competent authorities of the requested state shall confiscate subject to the category and quantity listed in the requesting state’s adjudication. It shall generally have the following conditions: (1) the prerequisite that competent authorities of the requesting state have officially made the effective decision of forfeiture; (2) any decision of confiscation assistance shall be made by courts of the requested state. It may directly use the form of decision to determine the recognition and execution of foreign judicial adjudication and be executed, or it may use judgment register process to give foreign adjudication the same effect as that of the requested state’s; (3) the decisions of withholding and forfeiture are independent from each other and shall be made in accordance with independent procedures, which means, even if the requesting state has got assistance in withholding or freezing, where the procedural requirements and legal conditions of recognition and execution are not reached, the aim of obtaining the property withheld cannot come true. As to the disposal of confiscated property, Article 14 of the *United Nations Convention against Transnational Organized Crime*, “Disposal of confiscated proceeds of crime or property”, has made some provisions. Its basic rules are: (1) Proceeds of crime of property confiscated by a State Party pursuant to “confiscation and seizure” and “international cooperation in confiscation” shall be disposed of by that State Party in accordance with its domestic law and administrative procedures. (2) when acting on the requests made by another State Party, State Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners. (3) a State Party shall also give special consideration to contributing the value of such proceeds of crime or property or funds derived from the sale of such proceeds of crime or property or a part thereof to the account which provides technical assistance to developing countries and countries with economies in transition or to intergovernmental bodies specializing in the fight against organized crime and sharing with other State Parties, on a regular or case-by-case basis, such proceeds of crime or property, in accordance with its domestic law or administrative procedures. And relevant provisions in Article 57 of the *United Nations Convention against Corruption* (Return and disposal of illicit money and goods) mainly conclude the following 4 aspects: (1) the return and disposal of illicit money and goods shall be conducted by the State Party that confiscated the property in accordance with the

provisions of that Convention and its domestic law. (2) each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to enable its competent authorities to return confiscated property, when acting on the requests made by another State Party, in accordance with that Convention, taking into account the rights of bona fide third parties. (3) in the case of embezzlement of public funds or of laundering of embezzled public funds, when confiscation was executed and on the basis of a final judgment in the requesting State Party, the requested State Party shall return the confiscated property to the requesting State Party or it can also waive this requirement; in the case of proceeds of any other offence covered by that Convention, when the confiscation was executed and on the basis of a final judgment in the requesting State Party, the requested State Party shall return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property, or the requested State Party can also waive this requirement; in all other cases, the requested State Party shall give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime. (4) unless States Parties decide otherwise, where appropriate, the requested State Party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property.

### **III. Exploration on specific methods of trans-boundary transfer of illicit money and goods between regions of China**

The methods of recovery and transfer determined by the “two Conventions” can be divided into 2 kinds and 5 specific sub-methods. And seeing from the current cooperation experience between the mainland and Hong Kong or Macao, we can find the sixth method, i.e., getting the illicit money at the money’s place on obtainment of the criminal’s entrustment.<sup>12</sup> These 6 methods have nearly covered all the current choices of trans-boundary transfer mode in different legal units of China. And each of them can be adopted corresponding to the specific situation when the mainland is cooperating with the other legal units. What we pay attention to is that we shall only take the modes determined by the “two Conventions” as references, and they shall not be directly applied.

Transnational transfer of illicit money and goods shall go through 6 steps: (1) collection of intelligence and evidence to recover assets; (2) obtainment of assets; (3) international cooperation, including judicial assistance request and unofficial assistance (basically through intelligence and information cooperation among different related functional departments); (4) property is confiscated through special legal procedures by courts; (5) execution of related court orders; (6) return of assets.<sup>13</sup> As to China’s inter-regional cooperation in recovery and transfer, if there is any certain normative legal files of cooperation between the two legal units, cooperation steps can also conclude the above 6 aspects; if without, cooperation can also be conducted actively among related functional departments, especially in intelligence and information of the assets, which will also contribute to the recovery and transfer of illicit money and goods.

Since the existing legal cooperation grounds between the mainland and Taiwan, Hong Kong or

Macao are different from each other, choice of specific methods may also be different. And these four legal units have also got different civil and criminal law respectively. In terms of the mainland, as to confiscation and recovery of illicit money and goods, both criminal and civil acts have got severe flaws, especially in the lack of relatively independent judicial procedures of confiscation. Where other legal unit requests the mainland to recover and transfer illicit money and goods, subject to existing legal resources, besides the legal ways in accordance with criminal and civil procedural acts, we can also use administrative forfeiture<sup>14</sup>, which means competent law enforcement organs as public security offices can, in the case of existing no controversy on ownership of assets, can execute confiscation and return.

If the mainland believes it has assets which are proceeds or benefits of crime in Taiwan, Hong Kong or Macao, it can choose proper method corresponding to specific situation.

### **3.1 Choices of trans-boundary transfer of illicit money and goods between the mainland China and Taiwan**

*The Agreement of Jointly Cracking down on Crime and Mutual Legal Assistance Across the Taiwan Strait* contracted between ARATS of Mainland China and SEF of Taiwan has provided a firm normative basis for recovery and transfer of illicit money and goods across the Strait. Article 9 of the Agreement provides that “both parties agree to give assistance for transfer or variation transfer of proceeds of crime to the extent not breaking its agreed scope”, a general provision of transfer of proceeds of crime. So far the mainland has not yet made any rules about this cooperation, while Taiwan has made its corresponding implementing rules called *Several Key Points of the Investigation and Collection of Evidence and the Transfer of Proceeds of Crime cross the Taiwan Strait*, Article 6 of which provides that “Relevant authorities shall, when competent authorities of the mainland have transferred proceeds of crime or variation of proceeds of crime on the request of Taiwan, where the property is not confiscated by courts of Taiwan and the legitimate owner remains unknown, unless competent authorities of the mainland notified Taiwan needless to return, return the property”. The department responsible for transfer of proceeds of crime in Taiwan is its procuratorial organ. Article 12.7 of the aforementioned implementing rules further provides the requirements and related procedures of transfer of proceeds of crime: when procuratorial organs of Taiwan received the request of transfer of proceeds of crime from the mainland, the request shall be examined from the following requirements: (1) particulars of crime on the letter of request shall also constitute crime pursuant to law in Taiwan; (2) proceeds of crime or variation of proceeds of crime requested to transfer shall not be confiscated by courts in Taiwan; (3) no one of legitimate right shall claim on proceeds of crime or on the assent of the person of legitimate right. Where the above requirements are deemed to be fulfilled on examination, the procurator can transfer proceeds of crime. If he thinks the method of transfer or variation transfer requested by competent authorities of the mainland must be changed, it shall be changed when “ministry of law” has consulted competent department in the mainland. The procuratorial organ assisting the execution shall hand in report of execution result to the “ministry of law” and the latter delivers it to competent departments in the mainland. If the request cannot be executed in full or in part, the “ministry of law” shall inform competent departments in the mainland or the reasons when the procuratorial organ hand in report. The “ministry of law” can, on assent of competent departments in mainland, transfer a part of proceeds of crime of request. Article 7 of the aforementioned implementing rules provides the items that cannot get assistance, which include: (1) the request does not fulfill the

provisions of decrees in Taiwan; (2) particulars in the letter of request do not constitute crime pursuant to law in Taiwan, unless those of severe social harmfulness and agreed by both parties to give assistance in specific case;<sup>15</sup> (3) the execution of request will disorder public orders and good customs; (4) the execution of request will hinder investigations, prosecutions or judicial procedures in progress; (5) any other matters that cause refusal or postponement of assistance. Besides, if the refusal or postponement is caused by temporary matters, "ministry of law" in Taiwan shall at the same time inform the mainland that it can put forward request again when the reason disappeared.

If the mainland presumes that it has proceeds and benefits of crime in Taiwan, it can put forward request in accordance with the method provided in the *Agreement of Jointly Cracking down on Crime and Mutual Legal Assistance across the Taiwan Strait*. And if mainland individuals or units presume their lawful property has been invaded and occupied by criminals and kept in Taiwan, they can also file a civil lawsuit or civil action collateral to criminal proceedings to recover. Specifically speaking, (1) where both criminals and victims are in the mainland, victims can file an infringement action against the criminals, and it can be solved by the way of independent civil action or civil action collateral to criminal proceedings.<sup>16</sup> Now that the effect of civil judgment of both Taiwan and the mainland are mutually recognized cross the Strait (provided in Article 10 of the Agreement<sup>17</sup>), both parties can, pursuant to principle of reciprocity, execute the abovementioned final civil judgment on entrustment. (2) where the victims are in the mainland and criminals in Taiwan, the victims can file civil actions in Taiwan or participate into civil action collateral to criminal proceedings.

### **3.2 Choices of trans-boundary transfer of illicit money and goods between the Mainland China and the Hong Kong SAR**

Since so far the mainland has not yet contracted any agreement of criminal legal cooperation with Hong Kong, recovery and transfer of illicit money and goods seem to be more complicated and difficult. Provisions about confiscation executed out of Hong Kong can be found in *Mutual Legal Assistance in Criminal Matters Ordinance* of the Hong Kong SAR, Article 3 of which, however, provides that the Ordinance is not applied to offer or obtainment of legal assistance in criminal matters between Hong Kong and the mainland. Therefore, it will not work if the mainland depends on the procedures determined by the Ordinance and hopes Hong Kong to solve the problem of requested return of assets.

Except for the aforementioned 6<sup>th</sup> method (adopted in Wen Qingwei Case), where the mainland has proved illicit money and goods being in Hong Kong, in different cases, the mainland can recover the assets on the basis of the following available ways:

#### **3.2.1 Victims file civil lawsuits with judicial organs in the Hong Kong SAR**

Victims can file civil lawsuits with courts in the Hong Kong SAR when proceeds of crime have been transferred to Hong Kong by criminals. Here first we should see to the jurisdiction. Crimes with victims also constitute civil infringement, and laws in the region where infringement acts happened have ever been applied to solve the controversies on jurisdiction and governing law.<sup>18</sup> Therefore, if victims are to apply this way, Hong Kong shall be deemed as the place of infringement act (including the place where infringement act happened and the place there the result took place), thus the victim's civil action can be filed with and supported by the courts. When the problem of jurisdiction has been resolved, if the action is filed by citizens or units and lack necessary requirements, legal assistance can be considered giving from designated organization; if



property infringed by criminals is state assets, designated state organs in the mainland shall be considered to file the action.

### **3.2.2 Victims file civil lawsuits with judicial organs in the Mainland China**

If victims are unable to file civil lawsuit with the courts in the Hong Kong SAR or the latter does not have jurisdiction, the victims can file civil lawsuit with the courts in the mainland. The judgment will be recognized and executed by competent authorities of Hong Kong on entrustment when the judgment comes into effect. Here the trouble is that currently courts in the Mainland China and the Hong Kong SAR can only conduct cooperation in recognition and execution of the judgments of civil and commercial cases under consensual jurisdiction, and pursuant to Article 3 of the *Arrangement between the Mainland and the Hong Kong Special Administrative Region on Reciprocal Recognition and Enforcement of the Decisions of Civil and Commercial Cases under Consensual Jurisdiction* promulgated by the Supreme People's Court, cases in cooperating are limited to civil and commercial contract dispute cases and exclusive of employment contract and other contracts with natural person as one party out of personal consumption, household matters and other noncommercial matters. Therefore, if the action filed by victims in the mainland is infringement action, the judgment cannot be executed by courts in the Hong Kong SAR in accordance with the Arrangement. Only when the particulars belong to, in accordance with civil and commercial law, act of both infringement and breach of contract will the courts in Hong Kong, when civil suit of assumpsit was filed in the mainland, on the basis of consensual jurisdiction, recognize and execute the final judgment of the case.<sup>19</sup>

Since there is not any fundamental files and cooperation mechanism on criminal judicial cooperation between the mainland and Hong Kong, transfer of illicit goods and money between them can only be achieved by civil judicial cooperation, but the mechanism of civil judicial cooperation is not complete either, which increased the difficulty of cooperation in this field. Now that the aforementioned two methods have great difficulty in executing in practice, judicial organs in the mainland are more inclined to solve this problem by the determined in Wen Qingwei Case.

### **3.3 Choices of trans-boundary transfer of illicit money and goods between the Mainland China and the Macao SAR**

So far the mainland has not contracted any agreement on judicial assistance in criminal matters with Macao. *Mutual Legal Assistance in Criminal Matters Act* of the Macao SAR has some rules about the recovery and return of proceeds, targets and tools of crime. Article 142.3 of the Act provides that "when the proceeds of crime are determined in Macao, the government of Macao shall take measures to execute the requesting court's adjudication of forfeiting proceeds of crime, and in this case corresponding provisions in Title 4<sup>20</sup> shall be applied". However, pursuant to Article 1.1 of the Act, the Act shall not be applied to mutual legal assistance in criminal matters between the mainland and Macao. Of course, the existing legal framework of the Act can be taken as a reference when the mainland and Macao are negotiating legal cooperation in criminal matters.

Compared with the foundation of legal cooperation between the mainland and Hong Kong, the foundation between the mainland and Macao could be better. The scope of recognition and execution of civil and commercial judgments in the *Arrangement between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments* is much wider, thus it provides a better legal basis for both parties to cooperate in the transfer of illicit money and goods. Of course, if both parties can contract some

agreements on the legal cooperation in general criminal matters (including the transfer of illicit money and goods), this problem can be better solved.

On the basis of existing legal files between the mainland and Macao, the way of filing civil lawsuit is available for the cooperation in the transfer of illicit money and goods between them.

### **3.3.1 Victims and criminals in the same legal unit and proceeds of crime in the other unit.**

The victim can file civil lawsuit with the courts with jurisdiction in his domicile, and return of assets can be achieved through mutual assistance in civil matters when the judgment becomes effective. In particular this means, the requesting party request the requested party of recognize and execute its own civil adjudications (including those collateral to criminal proceedings<sup>21</sup>). Pursuant to Article 1 of the Arrangement promulgated by the Supreme People's Court, the Arrangement shall be applied to the mutual recognition and execution of the judgments of civil and commercial cases in both the mainland and the Macao SAR, and it can also be applied to decisions and findings related to civil damages in criminal cases. Therefore, civil decisions of infringement cases made by the inland courts or decisions and findings related to civil damages in civil cases collateral to criminal proceedings, in accordance with the above article, can all be requested to recognize and execute by the procedures determined in the Arrangement.

### **3.3.2 Victims and criminals in different legal units.**

Victims shall file civil lawsuit or civil lawsuit collateral to criminal proceedings with the court in the criminal's domicile. If proceeds of crime are also at the court's place, the victim can apply to execute this property when the judgment becomes effective; if the property is at the victim's place, the return of assets shall also be achieved through corresponding mutual assistance in civil matters in accordance with the Arrangement.

The above exploration of trans-boundary transfer modes of illicit money and goods between the mainland and Taiwan, Hong Kong or Macao is on the basis of existing legal files. The key problem of the above exploration of possible ways is the recognition and execution of final judgment, whether civil or criminal. If this problem is smoothly solved, the trans-boundary transfer of illicit money and goods will become much easier.

## **IV. Conclusion**

The exploration of inter-regional transfer modes of illicit money and goods in China just gave a general direction for the solution of this problem, and its complicity calls for more provisions on specific problems, which may concern some fundamental awareness in different legal units. These problems conclude: the definition of illicit money and goods, the scope of adoptable coercive measures by the requested party, how to compensate the requested party's expenses during the process of recovery and transfer, how to solve good faith obtainment and how the third party can claim his rights, how to cooperate with the financial system, etc. To solve these problems, different legal units need to discuss honestly and adjust their positions positively; with the attitude of equity, to be practical and mutual respect, all these problems will be smoothly solved in a time.

In the current situation, how to make full use of existing legal resources to form a set of "precedents" which can followed by each party on the basis of cooperation case-by-case is of great significance to the solution of inter-regional legal cooperation in criminal matters in China. And in this respect, the inland police, procuratorial organs, customs and corresponding functional

departments in Hong Kong and Macao have conducted long-time and efficient cooperation, and this experience will also lay a foundation for the future's cooperation. Thus through consistent accumulation, mutual trust between different legal units will be promoted, and this promotion of great construction sense, is just the indispensable foundation for inter-regional cooperation in criminal matters.

## Notes:

- <sup>1</sup> See the case that Wen Qingwei, former manager of Fujian Sanhua Color Printing Co., Ltd. and Longyan Red Seven-wolf Color printing Co., Ltd., took bribes of RMB7,680,000. Cite from Chen Lei (2010). Reflection on Inter-regional Legal Cooperation under the Policy of "One Country, Two Systems" from the Trans-boundary Collection of Evidence in Wen Qingwei Case. In Zhao Bingzhi (Ed.). *Exploration on Inter-regional Judicial Assistance in Criminal Matters in China*. Beijing: Chinese People's Public Security University Press. 462. Also see Cao Wangshi (2010). ICAC of Hong Kong and Macao Assist to Recover Illicit Money and A Manager of State-owned Enterprise in Fujian Was Sentenced to Life Imprisonment. In the website of: [http://news.qq.com/a/20080310/002577\\_2.htm](http://news.qq.com/a/20080310/002577_2.htm). 4<sup>th</sup> September 2010.
- <sup>2</sup> The draft of the Arrangement mainly includes: mutual serve of criminal judicial documents, mutual entrustment of investigation and evidence collection and mutual offer of evidence. Cite from the Arrangement of Legal Assistance in Criminal Matters is Expected to Contract in the Next Half Year between the Mainland and Macao. In the website of Jornal San Wa Ou: <http://www.waou.com.mo/detail.asp?id=40649>. 4<sup>th</sup> September 2010.
- <sup>3</sup> Gao Mingxuan and Ma Zhengnan (2011). On the Precedent Models about Surrender of Fugitive Offenders between Hong Kong and Mainland. *Jurists*. Volume 1. 19-28. The paper put forward in consideration of the current situation that there isn't any normative files on criminal judicial assistance between the mainland and Hong Kong, we can establish precedents on the basis of case-by-case assistance and execute precedents in practice in the future. This suggestion has a positive influence on the solution of inter-regional cooperation in transfer of illicit money and goods between the mainland and Hong Kong or Macao.
- <sup>4</sup> Set the inland law as an example: to this crime, competent administrative authorities can confiscate and recover proceeds of crime and illicit property (Article 8 of Law of the People's Republic of China on Administrative Penalty), because this crime has also violated administrative law and rules at the same time (or even prior to crime) and competent authorities are entitled to take corresponding measures of punishments. This kind of proceeds of crime or illicit property may also belong to illicit money and goods. In this case, it's the administrative organs, but not courts, to make the decision of confiscation.
- <sup>5</sup> The PRC Government entered the Convention on 12<sup>th</sup> December 2000 and was ratified by the Standing Committee of the NPC on 27<sup>th</sup> August 2003. On 23<sup>rd</sup> September 2003, the the PRC Government handed in the certificate of ratification to the secretary of the United Nation and the Convention became effective in China on 23<sup>rd</sup> October 2003. The Convention is also applied in Hong Kong. On 7<sup>th</sup> September 2006, the State Council published the *Reply on Decision of Applying United States Convention against Transnational Organized Crime to the Hong Kong SAR*, and agreed the Convention applied in the Hong Kong SAR.
- <sup>6</sup> The PRC Government entered the Convention on 10<sup>th</sup> December 2003 and was ratified by the Standing Committee of the NPC on 27<sup>th</sup> October 2005. On 13<sup>th</sup> January 2006, the PRC Government handed in the certificate of ratification and the Convention became effective in China on 12<sup>th</sup> February 2006. The PRC Government stated: pursuant to Article 153 of the Basic Law of the Hong Kong Special Administrative Region of the People's

Republic of China and Article 138 of the Basic Law of the Macao Special Administrative Region of the People's Republic of China, China decides that the Convention is applied in the Hong Kong SAR and the Macao SAR; designates the Ministry of Supervision of the People's Republic of China as the organ of assisting other State Parties to make and execute specific prevention rules of corruption (when the National Bureau of Corruption Prevention of China was established, in December 2007 China informed the secretary of the UN that China designates "the National Bureau of Corruption Prevention of China as the organ of assisting other State Parties to make and execute specific prevention rules of corruption"), and in the Hong Kong SAR, the organ is the ICAC of Hong Kong, and in the Macao SAR, it is the ICAC of Macao; designates the Supreme People's Procuratorate of the People's Republic of China as the central organ responsible for and such matters as accepting judicial assistance request, and in the Hong Kong SAR, the organ is its Secretary for Justice, and in the Macao SAR, the organ is its Secretary for Administration and Justice.

<sup>7</sup> Huang Feng and et al. (2007). *International Criminal Law*. Beijing: Renmin University of China Press. 319.

<sup>8</sup> Huang Feng (2002). *Research on Problems of Recovery of Criminal Gains in International Judicial Assistance*. Political Science and Law. Volume 5. 11-21.

<sup>9</sup> Article 17.3 and Article 17.4 of the *Treaty on Criminal Judicial Assistance between the People's Republic of China and Canada* provide: "3. The requested party can transfer the aforementioned requested illicit money and goods to the requesting party to the extent as permitted by its domestic law, but the transfer shall not harm the third party's rights related to the property. 4. If the aforementioned illicit money and goods are indispensable to the trial of the pending criminal cases in the requested country, the requested party can postpone the transfer." A typical case: in August 2001, Jiangmen Intermediate People's Court of Guangdong Province, China confiscated a batch of smuggled goods and materials in accordance with law when hearing a smuggling case. Canada informed the competent authorities of China that 2 stolen cars of the Royal Canadian Mounted Police were in the smuggled goods and provided related certificate of ownership. In December 2003, the competent authorities of China returned the cars to Canada in accordance with its domestic law and the treaty of judicial assistance between them. Cite from Huang Feng and et al. (2007). *International Criminal Law*. Beijing: Renmin University of China Press. 322.

<sup>10</sup> In some countries, confiscation is not necessarily connected with criminal conviction in criminal proceedings. For example, pursuant to Article 462 and Article 38.2 of Criminal Code of Canada, when the public prosecution has been initiated and the defendant is dead or at large, as long as the judge deems "certain property, beyond reasonable doubt, belongs to proceeds or crime", it shall be confiscated and wait for the Attorney General's direction of disposal. Article 76a (1) of German Criminal Code provides, where it is impossible to initiate lawsuit or make decisions against fixed person out of practical reason and the requirements of punishment are satisfied, the court shall or can forfeit or confiscate the goods or variation of goods independently, or seal up independently; Clause 3 provides, where the defendant is exempted from punishment, or the procurator or the court or both of them decide to suspend the proceedings, in accordance with law, Clause 1 can also be applied.

<sup>11</sup> Pianin, I. A. (1982). Criminal Forfeiture: Attacking the Economic Dimension of Organized Narcotics Trafficking. *The American University Law Review*. 32 Am. U. L. Rev. 233.

<sup>12</sup> The above cited Wen Qingwei Case is just the case. For the disposal of Wen's house property in Macao, after getting the authorization of disposing of the property, the staff handling the case went to Macao and entrusted the barristers in Macao to make the instrument of authorized proxy pursuant to the request in Macao, then found a managing agent of house to dispose the house, through the intermediary of house in Macao, Wen Qingwei's house bought in Macao was sold; his house property in Hong Kong, also after Wen Qingwei authorized the staff, the staff handling the case went to Macao and Hong Kong and finished relevant procedures of transferring assets with Wen's carte blanche, then they opened an account on behalf of Wen, when the bank disposed Wen's investment in

the bank, strictly in accordance with related requirements of law and the bank in Macao and Hong Kong, the illicit money of the criminal's was timely transferred back to the mainland. Strictly speaking, in Wen's case, there wasn't any criminal judicial cooperation in the return of proceeds of crime in narrowed sense. The law enforcement organs in Hong Kong and Macao just provided positive help for the investigation of the particulars of the crime and details of assets.

<sup>13</sup> Brun, J.-P., L. Gray, C. Scott and K. M. Stephenson (2011). *Asset Recovery Handbook: A Guide for Practitioners*. Washington: The World Bank. 5-8.

<sup>14</sup> *Ibid.* 14. Besides the above introduced, the mode of confiscation also include administrative confiscation, which means, usually the police department or other designated department can, in accordance with domestic law, confiscate some property in fixed kinds and large amount and with no controversy on ownership, such as the custom's attack of smuggling. In terms of inland law, this mode is not unusual. In many economic crimes, competent administrative organs have first confiscated the proceeds of crime, then the case is transferred to public security organs to initiate criminal proceedings.

<sup>15</sup> This provision aims to implement Article 4.3 of the *Agreement of Jointly Cracking down on Crime and Mutual Legal Assistance across the Taiwan Strait*.

<sup>16</sup> The essence of civil action collateral to criminal proceedings is still civil action. Criminal procedural law in the mainland has detailed provisions about civil action collateral to criminal proceedings; Title 9 of Taiwan Criminal Procedural Law has also some provisions about it.

<sup>17</sup> The article provides that both parties, on the basis of the principle of reciprocity and not breaking public orders and good customs, mutually recognize and execute civil adjudications and arbitration awards (arbitration judgments).

<sup>18</sup> As to the jurisdiction and governing law in trans-boundary infringement cases, the general rules and rules of the applicable law determined in international private law shall be considered. As to the jurisdiction of infringement cases, Article 29 of Civil Procedural Law of the People's Republic of China provides, "a lawsuit brought on a tortious act shall be under the jurisdiction of the people's court of the place where the tort is committed or where the defendant has his domicile". As to the governing law of tortious act, Article 146 of General Principles of the Civil Law of the People's Republic of China provides, "the law of the place where an infringing act is committed shall apply in handling compensation claims for any damage caused by the act. If both parties are citizens of the same country or have established domicile in another country, the law of their own country or the country of domicile may be applied. An act committed outside the People's Republic of China shall not be treated as an infringing act if under the law of the People's Republic of China it is not considered an infringing act."

<sup>19</sup> However, this will form relatively more complicated legal problem, i.e., if the lawsuit the victim filed in the mainland is the suit of assumpsit, it will be contradictory with the conclusion that the particulars constitute crime. For the purpose of procedures, in this case the victim cannot file civil lawsuit collateral to criminal proceedings and he can only file an independent civil action.

<sup>20</sup> This title is the provisions about the execution of criminal judgments.

<sup>21</sup> Civil action collateral to criminal proceedings is also recognized by the Macao Criminal Procedure Code, Article 60 of which provides, "claim of damages on one commission of crime shall be put forward in criminal procedures; only with provisions in law can the claim be put forward independently through civil procedures".