

# Study on Chinese Criminal Assets Sharing System

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## Abstract

Criminal assets sharing is a common practice worldwide, which can encourage assets-inflow countries to cooperate more with each other, contributing to the criminal assets recovery of the victimized countries. This article explores the status quo of Chinese and American criminal assets sharing system, and put forward some measures to improve and develop this system in China. Judging from China's current domestic and international legislation in the field of criminal assets sharing, as well as extraterritorial experience of the USA, which can be achieved by strengthening external cooperation, improving relevant domestic legislation, and establishing a case-by-case consultation mechanism.

## Keywords

Criminal Assets Sharing System, Recovery of Outflow-Assets, International Criminal Judicial Cooperation

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## 1. Introduction

The massive outflow of criminal assets has caused negative impacts on the development of Chinese economy and society since the existing cross-border assets recovery system doesn't perform well. From 2003 to 2012, about 1.252 trillions US dollars illicit financial had outflowed from China, which accounts for 19% of the all 145 developing countries' outflow illicit financial (*Global Financial Integrity*, 2014). Criminal assets sharing is a common practice worldwide, which can encourage assets-inflow countries to cooperate more with each other, contributing to the assets recovery of the victimized countries. This article explores the status quo of Chinese and American criminal assets sharing system, and put forward some measures to improve and develop this system in China. The

so-called “criminal assets sharing” refers to a system in which the confiscated criminal assets are divided proportionally after deducting necessary expenses according to international conventions, bilateral treaties or interim agreements between the government of the country where the criminal assets flow out and the country that actually controls them (Gao, 2005). Although the International Criminal Justice Assistance Law of China passed in 2018 stipulated some provisions on criminal assets sharing system for the first time. Regrettably, few implementation rules had been made, which makes it still difficult to put this system in practice as well as indirectly led to the slow progress of China’s cross-border criminal assets recovery.

In order to explore such questions, this research will begin with the necessity of criminal assets sharing system in Section I. To improve a criminal assets sharing system, it is necessary to learn from extraterritorial experience. Hence section II addresses the excellent criminal assets sharing system of the US. Section III will describe the existing law framework of Chinese criminal assets sharing system, including domestic law and international law. Based on the previous work some specific measures are provided to improve the existing system in Section IV.

## 2. The Necessity of Criminal Assets Sharing System

At present, the international cross-border criminal assets recovery work is relatively well done in developed capitalist countries such as the United States and Canada, and the cross-border assets recovery results of these countries largely rely on their criminal assets sharing system. While China is a socialist country, whose public property is sacred and inviolable. In the past, the Chinese government has always believed that sharing criminal assets with other countries would weaken the sovereignty. Therefore, the criminal assets sharing system has not been applied in China by far, which indirectly led to the slow progress of China’s cross-border assets recovery as well as the disconnection of Chinese cross-border criminal assets recovery system with international standards.

Also, compared with cross-border pursuit of offenders, it is more difficult to carry out cross-border recovery of criminal assets since almost all of the countries in the world usually do not reject to the inflow of foreign property, even though the property is criminal assets (Zhang, 2012). When criminal suspects are found to have fled the country and transferred their assets abroad, the public security authorities and procuratorial organs in China are inclined to publish arrest warrant through Interpol or consult with the police liaison officers of the embassies of the relevant countries in China to request assistance (Wang et al., 2018). It illustrates that without the coordination and cooperation between assets-inflow countries the existing current Chinese cross-border recovery system can not work successfully and smoothly. However, in practice most of assets-inflow countries are unwilling to cooperate with others if they can not get benefits.

Over the past two years since the launch of “Fox Hunt” in July 2014, China has successfully recovered 2,442 offenders from more than 70 countries and regions, but the amount of recovered criminal assets is only 8.542 billion RMB (Chen et al., 2016). The cross-border recovery of offenders has achieved good results under a series of effective policies and measures, which dims the cross-border criminal assets recovery work.

In contrast to China, however, more and more countries around the world have accepted the principle of criminal assets sharing, especially the developed countries which are the main inflow countries of criminal assets. Both international conventions and bilateral treaties and the domestic laws have stipulated the rules and procedures of criminal assets sharing in these countries. In recent years, Chinese government has also realized this problem and actively reached agreements on criminal assets sharing with major property-inflow countries such as the United States, Canada, and Australia through bilateral treaties. The International Criminal Judicial Assistance Law of China in 2018 also stipulated simple provisions on this system from the aspect of domestic law. But all of these efforts cannot be achieved successfully in the application of criminal assets sharing in China due to the lack of detailed provisions in domestic law and other reasons. Therefore, China needs to accelerate the reform of the cross-border recovery system and better align with the international common practice. And the criminal assets sharing system needs to be improved and implemented urgently in China so as to recover a large amount of overseas criminal assets, which can curb the rate of the crimes in China effectively.

### **3. Extraterritorial Experience: Criminal Assets Sharing System of the USA**

The US created and improved the Criminal assets sharing system. China should learn from American’s experience and adopt international standards to improve its own system. In order for China to match American’s success, it is necessary to illustrate the origin, achievements and some significant provisions of American’s system. Apart from that, some relevant successful cases are given to better describe American’s criminal assets sharing system.

#### 1) Origin and Achievements

The United States, as the bellwether of the Western capitalist countries, had realized early on that it is crucial to recover both the offenders and the criminal assets overseas. And as we know that the criminal assets cross-board recovery system of the USA has been developed for nearly 200 years, which aims to not only punish the criminals by imposing property penalties, but also basically make the families of the criminals cannot continue to possess these assets. However, in recent years the phenomenon that more and more criminals have transferred their criminal assets abroad has also made the cross-border criminal assets recovery work of America an urgent matter due to the accelerated process of economic globalization. Under this background, the American judiciary has created

a new international cooperation model for recovering criminal assets—the assets sharing system.

*Money Laundering Control Act of USA (1986)* § 1166(i)(1) stipulated: “Notwithstanding any other provision of law except section 3 of the Anti Drug Abuse Act of 1986 whenever property is civilly or criminally forfeited under the Controlled Substances Act. The Attorney General may with the concurrence of the Secretary of State equitably transfer any conveyance currency and any other type of personal property which the Attorney General may designate by regulation for equitable transfer or any amounts realized by the United States from the sale of any real or personal property forfeited under the Controlled Substances Act to an appropriate foreign country to reflect generally the contribution of any such foreign country participating directly or indirectly in any acts which led to the seizure or forfeiture of such property” (*Money Laundering Control Act of USA, 1986*). It was the first provision about criminal assets sharing all over the world. So it is the US that created the criminal sharing system.

From Fiscal Year (FY) 1989 through FY 2014, the international assets sharing program administered by the Department of Justice shared \$249,543,192 with 46 countries. From FY 1994 through FY 2014, the international assets-sharing program administered by the Department of Treasury shared \$37,511,393 with foreign governments that cooperated and assisted in successful forfeiture investigations (*U.S. Department of State: 2015 International Narcotics Control Strategy Report, 2015*).

At the beginning the US applied this system to fight with drug crimes and recover money involved in drug deals overseas. After obtaining satisfactory results the US gradually applied it to other crimes, such as crimes of corruption. After that many countries around the world have followed the US to establish this system because of American’s great success of the criminal assets cross-board recovery system, including its successful establishment and positive effects.

The US enjoys the great reputation of the most developed country in the world with the world’s largest GDP as well as a mature financial market, which also is one of the largest importers of criminal assets in the world. It can not only return part of criminal property to the victimized country and also obtain a part of criminal assets legitimately through criminal assets sharing system.

## 2) Specific Provisions

In terms of specific procedural operations, the specific criteria for assets sharing were jointly determined by the U.S Departments of the Treasury, Justice, and Secretary of State in 1995, which was divided into three levels for assets sharing percentage: a) significant assistance was provided and then the percentage shared to the assisting country ranged from 50 to 80 percent approximately. b) Great assistance was provided and the percentage shared to the assisting country ranged from 40 to 50 percent approximately. c) Assistance only enjoys less than 40 percent sharing. The ratio for U.S criminal assets sharing, of course, can be set by bilateral treaties or agreements after the negotiation between two governments

involved (Chen, 2019).

Generally speaking, the American government has divided the sharing ratio into three levels according to the degree of cooperation provided, which is scientific and reasonable. In some cases, less assistance from the property-importing country is required to close the case due to the lower juridical cost, naturally, the sharing ratio should not be high. Some complex and complicated cases require more efforts from the property-inflow country to cooperate with the victimized country to recover both the offenders and criminal assets. Accordingly, higher juridical cost leads to higher sharing ratio, which is in line with common sense undoubtedly. And it is of great significance for the improvement of Chinese assets sharing system in the future. However, in practice, offenders committing corruption often flee to those countries that have not signed bilateral treaties with their own countries, which causes a big issue for American cross-border recovery work. To settle this problem, America have the tendency to determine the sharing ratio by interim consultations so as to close the case as quickly as possible.

### 3) Successful Cases

There are numerous successful cases about assets sharing in the United States. For example, the case of Switzerland and the USA share assets of criminal origin. The proceeds of illegal sports betting had been frozen by the Federal Office of Justice FOJ as part of legal assistance proceedings. In 2013, the U.S. Department of the Treasury proposed sharing the assets with Swiss authorities, who had provided legal assistance to U.S. authorities by locating, freezing, and ultimately assisting U.S. authorities to forfeit the assets. In one of the largest assets-sharing case to date, Switzerland and the USA have divided around \$50 million in assets of criminal (Federal Office of Justice FOJ: Switzerland and the USA share assets of criminal origin, 2015).

Another case is that an American businessman bribed relevant officials with the aim of obtaining oil and gas exploration rights in Kazakhstan. In order to recover the criminal assets, the US signed an assets sharing agreement with the governments of Kazakhstan and Switzerland and in the end American judiciary recovered part of criminal assets from Swiss bank successfully (Greenberg et al., 2014).

These cases show that criminal assets sharing system could make great contribution to recovering the American's outflow criminal property. And the U.S. Government could get a proportion of criminal assets when it returns assets to other countries through international mutual legal assistance. Numerous relevant successful cases in U.S juridical practice have also attracted more countries to establish this valid system in their own legal system. Nowadays it has become a common practice in the cause of international criminal assets recovery.

The U.S has created and developed the criminal assets sharing system, if possible, Chinese government could learn a great deal from the U.S practice in this aspect and quickly build a counterpart system in China in order to not only im-

prove the efficiency of cross-border recovery work but also better fight with crimes.

#### 4. Legislation Status: The Legal Framework of Chinese Criminal Assets Sharing System

Based on the existing law on criminal assets sharing it is more easy to determine how to improve Chinese criminal assets sharing system. The legal framework of it consists of domestic law and international law. Two major aspects of the legal framework will be examined as follows:

##### 1) Domestic Law

Over the last few years Chinese government was gradually aware of the essentiality of domestic law for the implementation of international criminal assets sharing. The Law of the People's Republic of China on International Criminal Judicial Assistance, as adopted at the 6th Session of the Standing Committee of the Thirteenth National People's Congress of the People's Republic of China on October 26, 2018. Article 49 of this law provided: "Where a foreign country assists in the confiscation or return of illegal income and other property involved in a case, the foreign affairs liaison authority shall, in conjunction with the competent authority, consult with the foreign country on the transfer of relevant property. Where a foreign country is requested to assist in confiscating or returning the illegal income and other property involved in a case, if the foreign country makes the sharing request, the amount or proportion of sharing shall be determined through consultation by the foreign affairs liaison authority in conjunction with the competent authority and the foreign country." (*Law of the People's Republic of China on International Criminal Judicial Assistance, 2018*). This article shows the positive attitude of China towards the criminal assets sharing system, but a headache is that there is even no provision for the most important issue, that is, the proportion of assets sharing. Obviously it is too obscure and ambiguous to guide the juridical practice. Compared with the developed criminal assets sharing system in the United States and Canada, China has much room to improve this system by constructing effective legislation as soon as possible.

##### 2) International Law

International criminal assets sharing inevitably involves the sharing of confiscated assets between two or more countries, as a result some countries require that bilateral sharing agreements or multilateral conventions should be followed in the specific case of sharing except for the domestic law of the confiscating country. As the Asset Forfeiture Policy Manual issued by the U.S. Department of Justice in 2012 makes clear, in the United States, the legal basis for international assets sharing is the U.S. Code (*Gao, 2014*).

The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances is the first international law that provided the criminal assets sharing system, article 5, paragraph 5 (b) of the Convention provides that

“the Sharing with other Parties, on a regular or case-by-case basis, such proceeds or property, or funds derived from the sale of such proceeds or property, in accordance with its domestic law, administrative procedures or bilateral or multi-lateral agreements entered into for this purpose” (*United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988*).

Apart from that, the first specialized international treaty against corruption, namely, United Nations Convention Against Corruption (UNCAC), was passed at the 51st session of the United Nations General Assembly in 2003. And the Chinese government also acceded to this Convention in the same year (*Chen, 2019*). The article 57, paragraphs 4 and 5 of UNCAC provided: “Where appropriate, Unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this article. Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.” (*United Nations Convention Against Corruption, 2005*).

In addition, China has actively signed a number of bilateral treaties with many countries in the field of criminal assets sharing systems, for example, the Agreement on Sharing and Return of Recovered Assets signed between China and Canada.

## 5. Improving and Developing Chinese Criminal Assets Sharing System

The existing law framework on criminal assets sharing in China is too simple to guide the judiciary practice. Judging from American’s experience and the specific legal flaw in Chinese law framework on criminal assets sharing, some measures are given in the next article to improve and develop existing Chinese Criminal assets Sharing System.

### 1) Strengthening External Cooperation by Signing Treaties

Signing relevant bilateral treaties with other countries is a significant measure to strengthen international cooperation in the cause of Chinese criminal assets sharing system. Most international conventions and treaties doesn’t have as strong binding force as domestic legislation, combined with restrictions from regulations such as the principle of sovereign immunity of states. Therefore, relying solely on accession to certain international conventions and treaties, such as UNCAC, can’t acquire the full assistance of assets-inflow countries. The improvement of the criminal assets sharing system requires the Chinese government to actively sign bilateral treaties on assets sharing with other countries, strengthening international cooperation in order to achieve a win-win situation.

In 2016, the Chinese government signed the Agreement on Sharing and Returning Recovered Assets with the Canadian government. Without the treaty, China cannot cooperate with Canada in cross-border assets recovery work since

the Canadian government pursues the principle of “no agreement, no sharing”. Canada is a major importer of criminal assets in China in the last few years. It is an urgent need to sign this treaty to speed up the cross-border recovery process. Meanwhile, Canada is not the only country which pursues such principles, therefore signing bilateral treaties with other countries to strengthen international cooperation is critical for China to establish the criminal assets sharing system.

Apart from the special treaty on criminal assets sharing, some treaties on mutual legal assistance in criminal matters between China and other country also stipulated some provisions on criminal assets sharing. For example, article 20, provision 1 of Treaty between the United Kingdom of Great Britain and Northern Ireland and the People’s Republic of China on Mutual Legal Assistance in Criminal Matters. It stipulated: “The Requested Party in possession of confiscated assets may, to the extent permitted by its laws, return those assets or the proceeds from the sale of such assets to the Requesting Party or share those assets or the proceeds from the sale of such assets with the Requesting Party. The requirements and arrangements for the return or sharing of such assets and the proportion to be returned or shared shall be agreed between the Parties.”

Problem is that now this kind of special treaty and provisions on criminal assets sharing is still not enough in existing Chinese law framework. There is just one special treaty on criminal assets sharing and there are no relevant provisions in Treaties on mutual legal assistance in criminal matters between China and France, Italy, Malaysia and many other countries. While sometimes bilateral treaty is the precondition for the cooperation on assets sharing. Therefore Chinese government should focus more on bilateral treaties in the process of constructing criminal assets sharing system.

## 2) Improving Implementation Rules through Domestic Legislation

A fundamental principle specified in article 5, paragraph 5 (a), of the 1988 The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: proceeds or property confiscated by a Party pursuant to paragraph 1 or paragraph 4 of this article shall be disposed of by that Party according to its domestic law and administrative procedures (Gao, 2014). This provisions shows that domestic law also plays a significant role in the process of criminal assets sharing although there are existing bilateral treaties or international law. Generally speaking, specific procedures and standards such as sharing proportion are stipulated in the domestic law of both parties. For example, in the second part of this article has illustrated the American domestic law on criminal assets sharing that stipulated the specific sharing proportion, procedures and the responsible institution. Also, the UK Home Office adopted the Seized Asset Fund in April 1991, which is dedicated to receiving requests from countries for confiscation or sharing, and distributing confiscated criminal assets in accordance with court orders (Smith et al., 2007). Apart from that, Canada, Australia and Sweden also adopted relevant domestic law to guide the judicial practice of crim-



inal assets sharing.

Judging from Chinese current legislation on criminal assets sharing, the biggest deficiency is its ambiguity and weak implementability. Although relevant terms are included in International Criminal Legal Assistance Act, they are too rough to guide the practice of cross-border criminal assets recovery in China effectively. Chinese legislation should clarify the scope, proportion, procedures and enforcement agencies of criminal assets sharing to improve this system (Zhao, 2021). If there is no clear domestic law to regulate the relevant operational procedures of criminal assets sharing, it is not only difficult to carry out assets sharing work, but also difficult to sign a bilateral treaty with other countries. Therefore, the most urgent task to improve and develop Chinese criminal assets sharing system is to improve the implementation rules through domestic legislation, making this system become the one with high operability.

### 3) Establishing a Case-by-Case Consultation Mechanism

Running a fixed assets sharing system through bilateral treaties and existing domestic law is idealized and inflexible, faced with high uncertainty in the practice. However, the law features with shortcomings such as hysteresis quality and rigidity, which makes it difficult to build a criminal assets sharing system by relying solely on domestic legislation, international law, and relevant bilateral treaties. Sometimes a case-by-case consultation mechanism could serve as a lubricant when the existing laws and regulations fail to balance the interests of each parties to make two parties conduct efficient cooperation, or when no treaty has been signed by two sides. At that time both the two or more parties should negotiate with each other about how to carry out judicial cooperation through assets sharing.

A scholar believes that a case-by-case consultation mechanism could make contribution to the signing of bilateral treaty. Sometimes criminal assets sharing may be carried out between two counties that never make cooperation on recovery of criminal assets with each other by a case-by-case consultation. And the achievements and experience of these cases could be beneficial to the future cooperation on this part, including signing a bilateral treaty (Zhang, 2020). Ou Wenlong is public office of Macao SAR government, and he was accused of corruption and money laundering crime in 2006. Part of his criminal assets were transferred into Britain. In 2010, Macao government requested to British government for legal assistance according to UNCAC with the support of central government. In 2015, British government returned 237 million yuan to Macao government (Ma, 2015). At the beginning of cooperation of this case, there was not a bilateral treaty on mutual legal assistance between China and Britain, let alone a bilateral treaty on criminal assets sharing. In 2013, Chinese government signed a treaty with British government named “Treaty between the United Kingdom of Great Britain and Northern Ireland and the People’s Republic of China on Mutual Legal Assistance in Criminal Matters”. And this treaty entered into force on 15 January 2016. Obviously, Ou Wenlong’s case made contributions to

the signing of this treaty. Therefore, there is no doubt that case-by-case cooperation could be beneficial to future cooperation, and a case-by-case consultation mechanism should be a significant part of Chinese criminal assets sharing system.

Chinese government should take individual cases as a starting point, gradually expanding the scope of sharing and cooperation with more countries contributes to both improving the situation of criminal assets recovery as soon as possible, and steadily promoting the construction of Chinese assets sharing system (Li, 2017).

## 6. Conclusion

The outflow of criminal assets has become a serious problem that restricts China's economic and political development. The results of China's cross-border recovery work in the past few years have been poor relatively. However, many countries, such as the US and Canada, did well in the cross-border recovery work, which mainly attributed to their criminal assets sharing system. Hence the existing Chinese criminal assets sharing system needs to be improved to better help China to carry out cross-border criminal assets recovery work.

This article has introduced the necessity of criminal assets sharing system at the beginning. Through this part the importance of criminal assets sharing system is clear. In order for China to match American's success, a specific criminal assets sharing system of the US has been introduced. The sharing ratio, procedures and some practical experience are deserved to be learned. Then the legal framework of criminal assets sharing system that consists of domestic law and international law had been described. Therefore, judging from the previous work, some specific measurement have been provided to improve and develop Chinese existing criminal assets sharing system, which could achieve by strengthening external cooperation through signing treaties, improving implementation rules through domestic legislation and establishing a case-by-case consultation mechanism.

## Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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