pexels-ekaterina-bolovtsova-6077447 /www.pexels.comzh-twphoto6077447

Citizen Judges System

Meng, Yu-Mei*

* The author, who wrote this Chapter in 2022, then serving as a Head Prosecutor of this offices.

I. Preface

The enactment of the Citizen Judges Act heralds unprecedented and significant changes to Taiwan's criminal justice system. This system will open up a new era for the general public to participate in the trying of criminal cases, allowing members of the public to move from the back of the courtroom to the front, and try criminal cases alongside professional judges, ensuring together they can bring justice for each defendant. As stated in Article 1 of the Citizen Judges Act, "This Act is enacted to enable citizens to participate in criminal trials with judges, to enhance the transparency of the judiciary, to reflect the legitimate legal feelings of the citizens, to increase the understanding of and trust in the judiciary, and to manifest the concepts of national democracy." If the enactment of the Citizen Judges Act offers good medicine to restore public trust in the judiciary, then prosecutors, as the main force of the criminal procedure law, should feel obligated to make this medicine effective and dispel the sense of distance and mistrust that has long been generated by judicial autonomy operating aloof from the citizenry.

II. Changes in the Trial Process

(I) The Process of the Trial of the First Instance

The Citizen Judges Act has created many novel procedures distinct from traditional criminal litigation to enable citizen judges to conduct trials together with professional judges. For example, the Act provides for non-conveyance of documents, the disclosure of evidence, the presentation of pleadings, and the voluntary testimony of parties. As a result, the mode of appearance and preparation of the prosecutor, and even the language customarily used by the prosecutor in court, have been revised from past practice. For example, to enable citizen judges, with no knowledge of the evidence on file, to grasp the direction of the case and the relationship between the issues and the evidence, an "opening statement" was added (Article 70 of the Citizen Judges Act). In the opening statement, the prosecutor must explain the facts of the crime to be proved, the scope, order, and method of the evidence to be investigated, and the relationship between the evidence to be investigated and the facts to be proved in easily understandable

language. To avoid overburdening the citizen judges' time and mental burden, the prosecutor should, as far as possible, carefully select the key evidence and focus on it in the courtroom[1] (Article 52, paragraph 4 of the Citizen Judges Act). This provision limits the flexibility and even overall holistic integrity of the prosecutor's testimony, and tests the layout and strategy of the prosecutor's evidence. When questioning a witness, it is important to know how to make the witness present a statement that is sufficient to prove the facts to be proved within the framework of the rules of direct and cross-examination, so that the citizen judges do not get lost in a sea of "Objections!". This involves whether the prosecutor has done his homework before examining the witness, so that he can grasp the content of the witness's testimony and bring out the witness's valuable testimony in a way that the citizen judges can easily understand.[2] The prosecutor should no longer use difficult legal language to present their case, but should instead use plain language that is understandable to non-lawyers. In addition, under current practice, prosecutors do not necessarily take the trouble to gather information for sentencing. In a trial involving citizen judges, sentencing is a direct reflection of citizen judges' legal opinions. Therefore, the direction of sentencing is bound to be a main point of contention between the prosecution and the defense. Thus, prosecutors should not neglect information that may affect the citizen judge's sentencing proclivities, and should even take the initiative to collect and present it objectively. In order to achieve a simple, understandable and efficient trial process, the author has argued that police inquiries and investigation transcripts are duplicative evidence compared to witnesses who can testify in court, and can only be used for impeachment evidence regardless of their evidentiary capacity. The identification report is also duplicative evidence compared to an identification witness who can testify directly in court, so there is no need for separate investigation. The autopsy transcript and the certificate of the examination body are duplicative and not the best evidence compared to the autopsy certificate, so it is sufficient to investigate the autopsy certificate

1. See Article 52 of the Citizen Judges Act, Legislative Note 4.

2. In the U.S. and Japan, where the adversarial litigation system is conducted by the parties, in order to conduct effective cross-examination on the trial date, the party calling the witness is requested to interview and depose the witness in advance of the trial date to confirm the testimony, i.e., the so-called "witness test". See "The Theory and Practice of Citizen Participation in Criminal Trial System", Judicial Yuan, December, 2019, Taiwan. https://social.judicial.gov.tw/LayJudge/Promoting/CommitteesAndCouncils/Publications (2021.07.22)

only. In addition, stimulating evidence such as photographs of the examination, photos of the deceased, and autopsy photos may easily affect citizen judges' prejudgment due to subjective feelings, so such evidence is not necessary to investigate,[3] and may subvert the criminal procedure familiar to the trial and prosecution.

(II) Procedures for the Trial of the Second Instance

Under the Citizen Judges Act, the Court of Second Instance is positioned as an adjournment and secondary trial. In other words, based on the secondary position, and in accordance with the purpose of the Citizen judges Act, the court will examine whether the judgment of the trial court has violated the rules of thumb and doctrine, based on the results of the investigation of the evidence adduced in the original trial. It is not designed to replace the judgment of the trial court of the first instance (which was made with the participation of the citizen judges) without new evidence after a new investigation of the evidence.[4] Therefore, Article 90 of the Citizen Judges Act stipulates that,[5] except for the cases listed in the proviso, the parties and the defense counsel may not request the investigation of "new evidence" during appellate proceedings. In other words, the Court of Second Instance may not set aside a finding of fact unless the original decision is contrary to the rule of thumb or the rule of reasoning and which clearly improperly affected the verdict (Article 92, proviso 1 of the Citizen Judges Act). The reason for the Citizen Judges Act to limit the authority of the appellate court to investigate the evidence and determine the facts to the maximum extent, is to evince due respect for the legitimate legal feelings

3. Wen, Chia-Chien, "The Role of the Trial of the Second Instance in the Citizen Civil Justice System," Judicial Weekly, 2033, December 11, 2020.

4. "The Court of Appellate Presumption of Rights of Citizen judges - Round 1" Project Outline, Judicial Yuan.

5. Article 90 of the Citizen Judges Act stipulates that a party or defender may not request the investigation of new evidence in the trial court of the second instance.

However, where the following circumstances obtain, and it is necessary for the investigation of new evidence, the aforesaid caveat does not apply:

(1) In the case of Article 64 Paragraph 1, Subparagraph 1, Paragraphs 4 or 6.

(2) Failure to make a claim at the first trial through no fault of the moving party.

(3) Facts or evidence that existed or were established after the conclusion of the first trial argument. The court of second instance may base its judgment on evidence that is competent and has been legally investigated by the trial court.

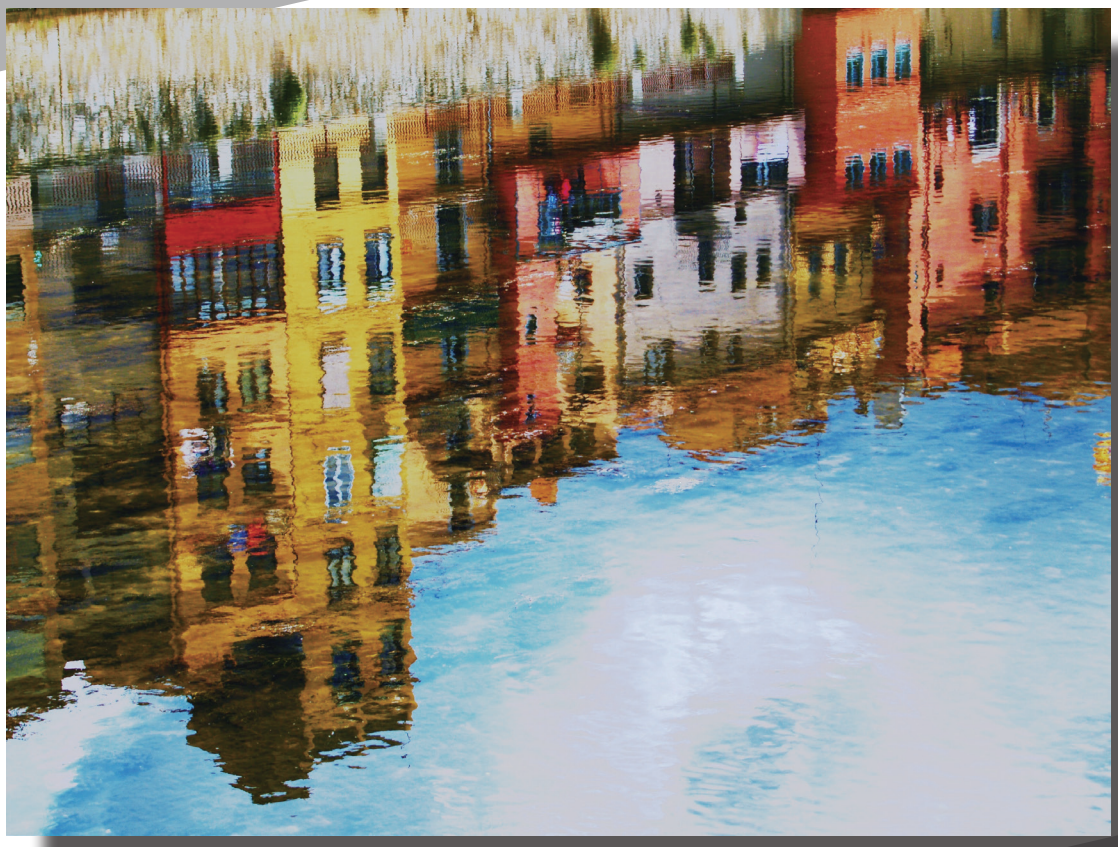
of the citizens as reflected in the judgment of the first trial and to fulfill the legislative spirit of the Citizen Judges Act.[6] However, this principle should be based on the premise that the evidence in the first trial has been fully investigated, so that all judges have sufficient and comprehensive evidentiary information on which to base their findings of fact. In addition to supervising whether the original decision violated the law, the prosecutor's task in the second trial should also be to examine whether the original trial improperly limited the investigation of the evidence, so that it could not produce complete evidentiary information for the citizen judges to determine in accordance with the rule of thumb or the theory of law. If the core value of criminal litigation, "finding the truth," is not upheld, and only a burden and pressure on the citizen judges is applied, the final result will not meet the expectations of the people, even if citizen judges participate in the trial.

III. Conclusions

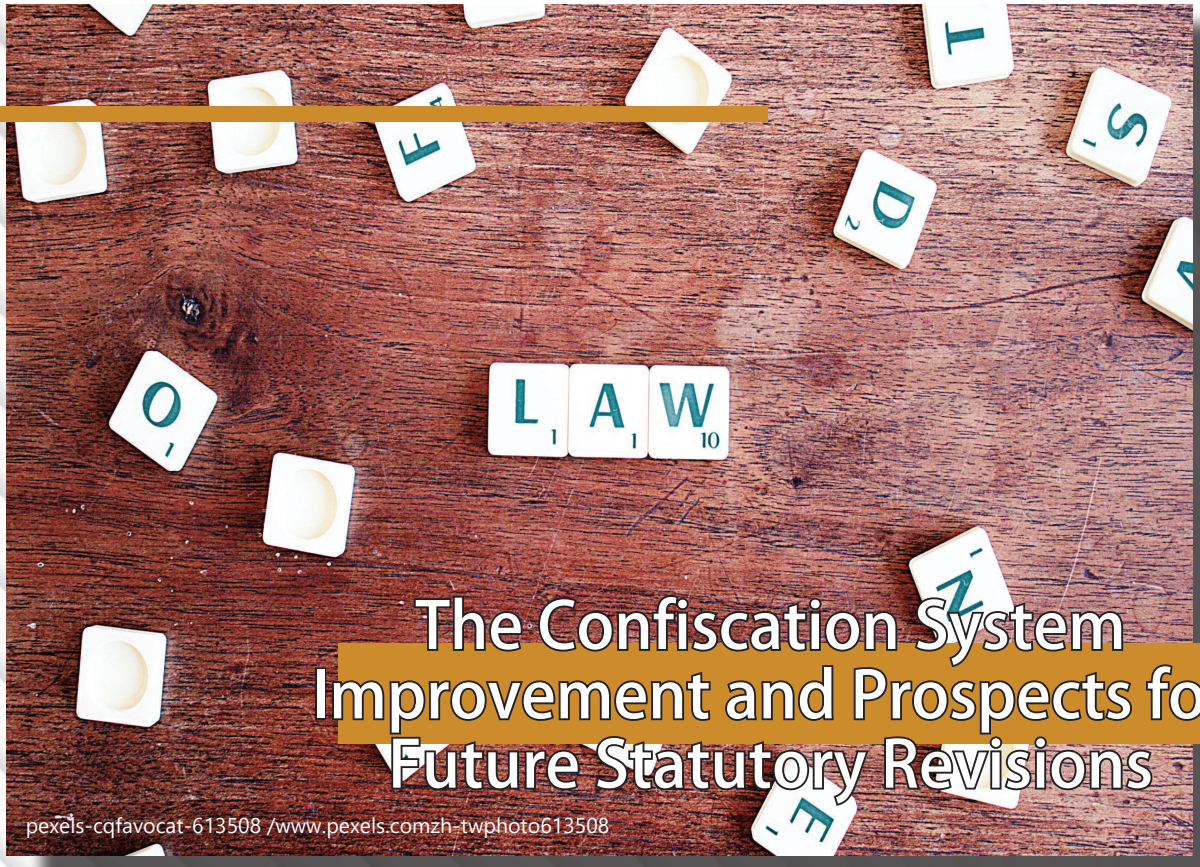
Under the system of citizen participation in trials, the trial court (professional judges), prosecution, and defense jointly conduct a professional judicial exchange with ordinary citizens who are judges in a concrete and real criminal case. From the trial judge's explanation of the law to the citizen judges,[7] the prosecutor's opening statement, the investigation of various types of evidence, to the final evaluation and sentencing, each step is a process designed for the citizen judges to better understand the law and experience law enforcement. As prosecutors, we should realize that the investigation, prosecution, and trial are no longer done in a judicial ivory tower where only lawmakers are present, but also with equal citizen judges. Therefore, what prosecutors need to demonstrate is not only a vigorous prosecution of crimes and criminals, but also an assurance to citizen judges that the core values of prosecutors is upholding the law and realizing justice. If a prosecutor is able to use his or her profound legal knowledge to translate difficult legal regulations into knowledge that ordinary citizens can understand, they must use plain language that ordinary citizens can understand, evincing the fairness and justice that a prosecutor seeks to uphold on behalf of the state. This will enable the people to accumulate respect and trust in the judiciary from the moment they declare themselves to be citizen judges.

6. See Article 92 of the Citizen Judges Act, Legislative Note 1.

7. See Article 66 of the Citizen Judges Act.



pexels-pixabay-164455 /www.pexels.comzh-twphoto164455



pexels-cqfavocat-613508 /www.pexels.comzh-twphoto613508

The Confiscation System Improvement and Prospects for Future Statutory Revisions

Huang, Shih-Yuan*

* The author, who wrote this Chapter in 2021, then serving as a Head Prosecutor of this offices.

I. Preface

The New Criminal Confiscation System of the Criminal Code, took effect from July 2016 (including the provisions of Penal Code and provisional seizure in the Code of Criminal Procedure), as the third dimension of fighting against crime other than traditional binary dualism of criminal sanctions and status quo preserving security dispositions. According to the new system, the objects of confiscation are divided into Thing of Crime Confiscation (Article 38 of the Criminal Code, the subject of confiscation includes instruments and products of crime) and Criminal Proceeds Confiscation (Article 38-1 of the Criminal Code). Under the old system of confiscation in Taiwan, the main axis of practice has long been the Thing of Crime Confiscation. Under the new system, there are fewer changes to the Thing of Crime section, while enhancement of the Criminal Proceeds portion has taken the lead, as is prevalent around the world. The purpose of the new system is to ensure that no one can retain criminal proceeds and to restore the order of property existing antecedent to infringement of legal interests, achieving judicial equity, justice and the effect of crime prevention. The traditional theory of punishment shifts to the penal sanction of "economic crimes, require economic solutions", and opens up a new era in the economic Criminal Code. This chapter focuses on the performance of the sanctioning function of the prosecuting authority, and in the future prospects for the system of Criminal Proceeds Confiscation.

However, the acts cannot be enforced by themselves, and must be specifically accomplished by law enforcement authorities. In order to strengthen the effectiveness of the New Confiscation System, on January 17, 2017, the Ministry of Justice established the "Guidelines for Prosecutors to Recover Criminal Proceeds" (the "Guidelines"). The Guidelines stipulate that the Taiwan High Prosecutor's Office should establish an information platform for the recovery of criminal proceeds (the “information platform”), hold regular meetings to report the recovery of criminal proceeds, set targets for the seizure of criminal proceeds and the implementation rate of confiscations, and supervise implementation of the guidelines at all levels of prosecutors’ offices in the hope of gradually improving the quality of seizure of criminal proceeds. However, more than five years after the implementation of the new Confiscation System, are there still inadequate regulations in the process of applying the existing laws to

combat crimes of various types of profit-oriented crimes by the prosecuting authorities? In considering implementing various "in rem" compulsory dispositions, in a nation governed by the rule of law, persons inevitably will challenge such interference with their property. As for the legislative theory, due reference must be accorded foreign legal systems such as the relevant German legal provisions which especially inform provisions of our New Confiscation System. Analyses for improvement of law enforcement and the outlook for future legislation are as follows.

II. Improving law enforcement in prosecutors' offices

After implementing the new Confiscation System, if the criminal proceeds have been seized (or automatically returned) during the investigation or trial process, the confiscation or return of the proceeds to the victim can be carried out smoothly after the final judicial decision is confirmed, thus realizing judicial equity and justice. If the criminal proceeds are not seized in a timely manner, even if the judgment determines that the offender or the third party did have unlawful profits, and the confiscation or collection is authorized, it will be difficult to smoothly execute the confiscation or collection, because the offenders will have often squandered all the money or released all the assets, and the purpose of depriving the criminal proceeds cannot be achieved, and judicial equity and justice will not be realized. This shows the importance of recovering the criminal proceeds in the investigation and trial. The Taiwan High Prosecutor's Office will continue to supervise the implementation of the seizure and appraisal operations by its prosecutors, and may consider the following refinements:

(I) Prosecutors should be familiar with the explanation of the seizure rulings and the plans for recovering the criminal proceeds

1. Regarding physical seizure aspects: The purpose of the prosecutor's request to the Court for an order of Seizure for Recovery is for the future actual enforcement of the confiscation of unlawful profits. As for the due cause for a confiscation, the motion

should declare the special assets of the offender gaining benefit therefrom, which necessitates a future physical seizure, for which an order of Seizure for Recovery should be duly granted. A case of Seizure for Recovery should follow the order of examination for the Criminal Proceeds Confiscation of Profits, and should be explained one by one [please refer to Reference 1 below]. In short, the motion should at least state whether the subject matter of the motion is the profits of the offender/third party beneficiary. Is it a direct/indirect gain/or what is the replacement value? Are they criminal proceeds/ or proceeds advancing crimes? If it is a third party's profit, should the criminal proceeds be accounted for as a proxy/misappropriation type of illicit benefit? If the proceeds are derived from a crime, there are also issues such as the priority of return to the victim(s) over confiscation.[1] If the result of the interpretation still results in an ambiguous legal relationship, the court reviewing the seizure decision may presume the prosecutor's true intentions, which may not only lead to a miscarriage of justice through an improper order, and also violate the property rights of the interfered person and violate the purpose of the criminal procedure.[2]

2. Regarding the procedural aspects: As mentioned above, since the relevance of the subject matter of the criminal proceeds to the case needs to be clarified and explained, and since there is a wide variety of possible subject matter, elucidation requires much professionalism and is not at all a mere matter of course. Therefore, it is appropriate for prosecutors to develop and implement (recovery) a seizure (securing) plan on a case-by-case basis,[3] including: a. Developing an asset tracing plan. b. Drafting a Seizure for Recovery Plan. c. Executing the Seizure for Recovery Plan. In this way, we can accurately motion the Court and execute a Seizure for Recovery.

---

1. Wang, Shih-Fan, Priority Return of Crime Proceeds to Victims: A Brief Analysis of the Return Clause in the New Criminal Code, The Taiwan Law Review, April 2016, No. 251, pp. 81-82.
2. The purpose of criminal proceedings in the rule of law is to discover the truth and protect human rights. Chen, Chih-Lung, "The Interaction of Prosecution, Defense, and Trial in the Criminal Cognitive Process: The Task of the Prosecutor and the Integration of Prosecution," edited and published by the Ministry of Justice, November 2001, p. 4.
3. Huang, Shih-Yuan, Preserving Seized Criminal proceeds in Investigations, Judicial Aspirations, No. 123 (July 2017), pp. 17-18.

(II) Strengthen the functions of the Tracing Criminal Proceeds Special Unit of the Prosecutors' Offices

To ensure the dedicated functions of the Tracing Criminal Proceeds Special Unit, they are to be established by all Prosecutorial entities pursuant to Article 4 of the Guidelines. It is also appropriate to empower the Special Unit prosecutor (convener) to actively participate and assist the prosecutors of each unit to prepare [execute] seizure (recovery) plans, prepare seizure motions, and analyze the flow of funds or execute the authority on property of changing value. This will mean proactive and not merely passive consultations, the purpose of which is to pool ideas, develop the team's ability to handle cases, and improve professional competencies in recovering the criminal proceeds.

(III) Supervising the respective prosecutors' offices to implement inspecting information on criminal proceeds seized during investigation

To fully and accurately grasp the effectiveness of each prosecutorial entity in recovering criminal proceeds, statistical data on seized criminal proceeds should be in a standardized format and items, and correctness of data input should be confirmed and verified.

III. Future Prospects of the Legislative Theory

(I) Additional fundamental provisions for Criminal Proceeds Confiscation

In accordance with the provisions of Article 38-1 of the Criminal Code and the general interpretation of the domestic literature, there is a logical and theoretical six-stage examination sequences for the confiscation and securing preservation of criminal proceeds, which is briefly described as follows[4]: (1) Prerequisite examination: Is there criminal wrongdoing in the case? (Article 38-1, Paragraph 4). (2) Benefit or no benefit examination: Does the case involve profit attributable to crime committed by the offender (accomplice)? (Article 38-1, Paragraphs 1 and 2). (3) Who receives the profits: Who receives the profits of the crime in question? (Divided into Article 38-1, Paragraph 1, "Profits of

4. Lin, Yu-Hsiung, Criminal Proceeds Confiscation: The Review System and the Application of Interpretation, New Theory of Confiscation, September 2020, pp. 93-126.

the offender" and Paragraph 2, "Profits of a third party") (4) Scope of Profits: Direct and Indirect Profits (Article 38-1, Paragraph 4) and "Substitute Value" (same Article, Paragraph 3). (5) Reviewing exclusion of forfeiture from reimbursement: (Article 38-1, Paragraph 5) Priority of reimbursement to the victim(s) and exclusion of forfeiture. (6) Legal effects: Obligatory forfeiture with a too harsh adjustment clause.

Regarding the part of the examination of whether there are profits in the second stage, the Criminal Code Article 38-1 as to criminal proceeds, includes all appreciation in value of property directly from the crime, with the economically measurable benefits included, including fungible savings in expenses. Direct profits can be divided into two major categories depending on the reasons underlying their receipt: "Entgelt" (reward/ consideration) obtained for the commission of a crime "fur die Tat", or profits/benefits "Gewinn" obtained from the commission of a crime "aus der Tat". The latter refers to the value of property obtained by the offender in a process directly related to the realization of the crime itself (such as, theft, fraud). The former refers to payment of consideration obtained by a offender as a result of the crime (i.e., bribes received by civil servants for violation of their duties). These two (classes) are the causes of profit generation and are distinguished from each other by the following criteria and benefits: In other words, only profits arising from crime "aus der Tat" are subject to confiscation as a result of the realization of the victim's right to claim compensation. As for the profits from the commission of a crime, the nature of which is "payment for unlawful reasons" (Article 180, Paragraph 4 of the Civil Code) they are not subject to restitution, and there is no place for their restitution to a victim. The German Criminal Code, Article 73, Paragraph 1, is worth referencing in this respect,[5] and is proposed to be added to Article 38-1, Paragraph 1, of the Criminal Code.

5. The court should declare the forfeiture of the proceeds of the illegal acts or the proceeds of the illegal acts of the offender or accomplice.

(II) To add an expansion of the Criminal Proceeds Confiscation provisions in the General Provisions of the Criminal Code

What does an expansion of the forfeiture of Criminal Proceeds Confiscation signify? In a nutshell, it references a system extending the scope of confiscation from the "present case" to the confiscation of criminal proceeds in related "other cases". The purpose of introducing the expansion of the Criminal Proceeds Confiscation to include the proceeds of related "other cases" is to further deprive wrongful gains and implement the original purpose of the Criminal Proceeds Confiscation system ensuring "no one gains from crime". Taiwan's New Criminal Confiscation System did not yet introduce the expansion of the Criminal Proceeds Confiscation provision. However, Article 18, Paragraph 2 of the Money Laundering Control Act (MLCA), as amended and taking effect as of June 28, 2017, introduced this system for the first time. Subsequently, Section 19, Paragraph 3 of the Narcotics Hazard Prevention Act (the "NHPA"), as amended on July 15, 2020, added an extension of the Criminal Proceeds Confiscation provision to follow the Money Laundering Control Act.

Taiwan has already seen cases[6] in practice following implementation of the Criminal Proceeds Confiscation from the Money Laundering Control Act in the individual provisions of the Narcotics Hazard Prevention Act. However, in terms of legislation, unlike the German Criminal Code[7], our Criminal Code does not have a general provision that extends to Criminal Proceeds Confiscation. As a result, the extent to which the various elements of the general Criminal Proceeds Confiscation (such as for indirect profits, substitute value, reimbursement clause, estimation clause, excessive terms and effect clause) can be applied to the individual provisions of the subsidiary (special) Criminal Code not as clear as the

6. For example, Supreme Court 2021 Appeal Decision No. 2231.

7. Article 73a Paragraph 1 of the German Criminal Code stipulates that the court shall also confiscate the objects obtained by the offender or accomplice of an unlawful act by or for the purpose of another unlawful act.

8. Lin, Yu-Hsiung, supra note 8, at p. 388.

9. As stated in the gist of the Supreme Court's 2019 Criminal Reconsideration Decision No. 1579.The criminal proceeds that should be confiscated from a deceased defendant or suspect or offender. Although the criminal proceeds that should be confiscated by a deceased defendant, suspect, or offender are vested in his or her

German law. From the legislative point of view, it would be advisable to establish a general extension of the Criminal Proceeds Confiscation provision to the General Provisions of the Criminal Code, establishing their common elements, and to specify which provisions of the General Provisions of the Criminal Code are applicable for confiscations.[8]

（III）Third party (successor) profits Criminal Proceeds Confiscation provisions

The following are the cases where the criminal proceeds of the perpetrator are transferred to his or her successor by legal reason of succession to the proceeds. The Supreme Court has recognized that the acquisition of criminal proceeds by a successor is in the nature of diversion of third party profits under Article 38-1, Paragraph 2, Sub-Paragraph 2 of the Criminal Code and should be confiscated.[9] However, with the general gratuitous acquisition or appropriation type, the wrongful transfer of profits provides the intended reason, while the inheritance type is a statutory reason, although the nature of their gratuitous acquisition is not different, but there is a difference in the reasons for the appropriation, which the new system of confiscation in Germany in July 2017 included by adding the inheritance type third person confiscation provisions (including the special reserved sub-heirs and legatees)[10], in order to facilitate the application of the principles of legal reservation and legal certitude, and to avoid the criticism for judicial law-making by application of analogous circumstances. The provisions of Article 73b, Paragraph 1, Sub-Paragraph 3 of the German Criminal Code should be used as a reference for future legislation in Taiwan.

（IV）Additional collection in the difference of the substitute value

If all or part of the proceeds of a crime cannot be confiscated or it is inappropriate to execute confiscation, Article 38-1, Paragraph 3 of the Criminal Code stipulates that a

heirs by reason of inheritance, they are acquired without compensation as far as the heirs are concerned. compensation as far as the heirs are concerned. Therefore, before the conclusion of the verbal debate (and cross-examination) of the factual trial, the prosecutor may apply to the court for a declaration of confiscation against the successor in accordance with the law.

10. Article 73b, Paragraph 1, Sub-Paragraph 3 of the German Criminal Code stipulates: If a person other than the offender or accomplice acquires the proceeds of a crime by virtue of being: a. the heir, or b. the special successor or the recipient of the estate, the confiscation shall be declared in accordance with Article 73 and Article 73a.

collection shall be imposed on a substitute value equal to the value of the proceeds of the crime. However, the difference between the original price of the direct proceeds of the crime and the subsequent market price may be due to a variety of reasons, such as the sale of stolen goods at a low price or the loss of value due to improper storage of paintings received as bribes.

In Germany, due to the requirement for deprivation of criminal proceeds, the second sentence in Article 73c of the German Criminal Code stipulates that any difference in the substitute value should also be collected upon. Taiwan law does not explicitly provide for this, but the result of the interpretation is the same; However, in order to comply with the requirements of legal reservation and clarity of legal authorization, and to avoid the application of analogy with unfavorable sanction effect on the beneficiary, it is still necessary to add a provision.

As for the issue of premiums, which are the opposite of differences, it means the price of the indirect profit substitute (Surrogate) is higher than the price of the original direct profit: From the standpoint that the Criminal Code Criminal Proceeds Confiscation also deprives substitutes and use benefits (fruits/usufructs), as the offender should not only not enjoy the direct profits, but also should not enjoy the benefits obtained as a result of the direct profits, and should therefore be deprived of them all. However, this part can be deduced from the jurisprudence under Article 38-1, Paragraph 4 of the Criminal Code, and there is no need to add further explicit provisions.

（V）To add a section on joint (collateral) forfeiture

Should the proceeds of a joint criminal enterprise be confiscated jointly (collaterally)? This issue has been a controversial once since the time of the old law of confiscation in Taiwan. As far as our legislation is concerned, this issue is not regulated by either the old or new confiscation laws. As for the German Criminal Code, the confiscation provisions have evolved, but so far there is no explicit provision providing for joint confiscation. The question of what crime the joint offenders of a crime (or accomplice in the broad sense) should be convicted of and what type of offender or accomplice they should be is a

matter of "criminology"; the question of how to confiscate the criminal proceeds is rather, a matter of "sanction"[11]. The old practice in Taiwan confused the two by the principle of cross-attribution of responsibility for a part of the act of joint criminality, which leads to the result of the sanction theory of confiscation, which is deemed inappropriate.

As mentioned above, according to the Criminal Proceeds Confiscation system, in the second stage of the "with or without profit" examination, whether a person has received wrongful profit is determined. It depends on whether they have obtained "de facto authority to dispose" of the subject matter and thus made a financial gain. In the case of a broad accomplice, the special elements that form the basis for joint forfeiture include both subjective and objective aspects. The objective portion is to have joint disposition authority, and the subjective dimension is to have the consent to obtain joint disposition authority. After the release of the New Criminal Confiscation System, the Supreme Court created the term "joint confiscation" in its decision No. 3604 of 2015, before the third reading of the Code by the legislature. The ratio decidendi of the decision is: When each member of a joint criminal enterprise in fact has joint authority to dispose of the wrongful gain, he or she shall be jointly liable for confiscation. In this context, the conditional affirmation of joint forfeiture can be stated, but for the sake of distinguishing the old doctrine of collateral forfeiture liability, it is renamed as joint forfeiture.[12]

But what is the meaning of joint forfeiture? What is the difference between joint and collateral confiscations? How should joint forfeiture be enforced? The Supreme Court, in its decision No. 3111 of 2017[13], partially transposed the doctrine of equal sharing, and held that the so-called joint forfeiture means equal sharing. However, scholars have criticized that the equal apportionment theory is actually a declaration of "separate" confiscation, not "joint" confiscation, and that the analysis has the following shortcomings, which obviously do more harm than good[14]: (1) The claim of equal apportionment is

11,12. Lin, Yu-Hsiung, supra note 8, p. 325, 338.

13. The joint forfeiture liability is referred to Article 271 of the Civil Code, "When several persons undertake the same obligation, and if the prestation is divisible, each of them shall be responsible for or be entitled to the prestation equally, unless otherwise provided by the act or by the contract. And the first clause of Article 85 Paragraph 1 of the Code of Civil Procedure provides: "Co-parties shall bear the litigation expenses in equal proportion", the juridical principle of which is for the equitable shared apportionment.

14. Lin, Yu-Hsiung, supra note 8, pp. 341-343.

a declaration of separate amounts, not a joint forfeiture; (2) The transfer of the law's purpose: Why is joint forfeiture a divisible debt (instead of an indivisible debt) under civil law? The joint forfeiture is a divisible debt under civil law (not an indivisible debt), not to mention the "joint burden" of litigation costs, which is even more irrelevant; (3) Apparent Unfairness: the gang leader, who takes the profits, and the errand boy, who only shares a little sweetness, "share" the same amount of crime proceeds together; (4) Unrealistic: The abusive practice of "averaging the criminal proceeds if you can't explicitly determine attribution" is not in line with the rules of thumb in criminal practice; (5) Unclear basis for estimation: If the claim of equalization is to be found in law, it is essentially an estimation, and the focus should be on a reasonable basis for the estimation, rather than a lumpy estimation that all people share equally; (6) Unclear division: The so-called "unclear distribution" is often the result of not even being able to identify the few people behind the scenes who are hiding behind a mirror; (7) Preventing civil claims: Equal division means that the amount allocated to each person is not clearly formulated, which may prevent the possibility of claiming civil compensation from others among the co-offenders.

The German Federal Supreme Court (Bundesgerichtshof) has insisted on joint and collareral forfeiture as a way to deal with unlawful gains, which has been in place for years and has been recognized by the Federal Constitutional Court (Bundesverfassungsgericht)[15]. The BGH supports joint and several forfeiture for the following reasons:[16]

The standard for determining joint liability for criminal proceeds is to use an "evaluative holistic view" in which several offenders are jointly and severally liable to the extent that they have joint dominion over the criminal proceeds. It is sufficient if the condition is met that "the proceeds of the crime fall into the control of the offender or participant at any stage of the act as a direct result of the realization of the constituent elements, and the offender obtains de facto dominion as a direct result of the act and has an increase in overall property as a result". This is generally proper even though individual actors may be subject to a higher forfeiture declaration than the amount they actually received because of their joint and several liability, because: (1) Criminal Proceeds Confiscation is not a penalty in nature; (2) the offender has the right to exercise his or her rights against

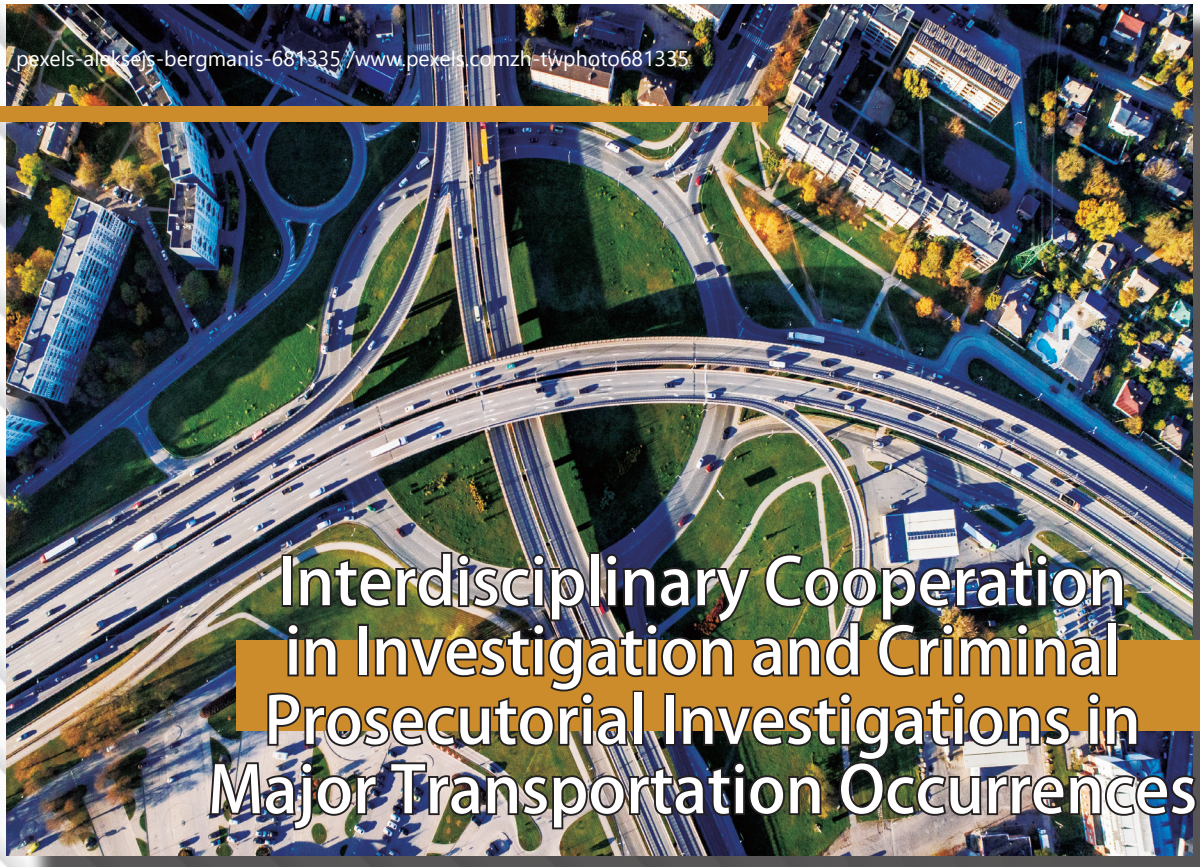
the other co-offenders in accordance with the provisions of the joint and several internal claims; and (3) the joint and several liability can avoid excessive deprivation of all co-perpetrators by the court.

Therefore, German practice recognizes the two main purposes[17] of the joint and several liability regime in relation to the broad accomplices: (1) to provide creditors with a smoother and simpler way to seek their claim; (2) to transfer the risk of individual debtors' failure to pay to other debtors, and to have them share the burden. And to require the joint co-offenders to bear the risk that any one of them can not pay, is more reasonable than requiring the victim alone to bear these risks when their legal interests have already been unjustifiably infringed. The German practice has been dealing with the issue of unexplained distribution of unlawful profits among co-offenders for a long time, and it has been settled through the means of joint and several debts, which affords a stable opinion to inform our legislation.

IV. Conclusions

It has been more than five years since Taiwan's implementation of the New Criminal Confiscation System, and it is now timely to review the effectiveness of the recovery of criminal proceeds during this period. The current situation of criminal prosecution agencies in handling the recovery of criminal proceeds still leaves some room for improvement in terms of law enforcement, as mentioned above. As for the legislative outlook, the inadequacies of the new confiscation system have been gradually discovered during the period of its application. We look forward to the concerted efforts of our knowledgeable people to facilitate application of "economic crimes require economic solutions" to combat such crimes while serving the functions of crime prevention.

15. Yun, Chun-Liang, "Joint and Several Forfeiture - An Analysis of German Practical Classics," in New System of Forfeiture (III): The Deprivation of Wrongful Gain, March 2019, p. 85.
16. Yun, Chun-Liang, "The Joint and Several Forfeiture - A Translation of the German Federal Supreme Court Criminal Decision BGHSt 4StR 215/10 (= BGHSt 56, 39)," translated and explicated in New System of Forfeiture (II): A New Era of Economic Criminal Law, September 2016, p. 534.
17. Yun, Chun-Liang, Yun, Chun-Liang, op. cit.



Interdisciplinary Cooperation in Investigation and Criminal Prosecutorial Investigations in Major Transportation Occurrences

Chen, Shu-Yun *

---

* The author, who wrote this Chapter in 2022, then serving as a Head Prosecutor of this offices.

I. Preface

In order to recreate the accident scene, ferret out the truth, and meet the expectations of the Taiwanese citizenry, the Taiwan Transportation Safety Board ("TTSB") and prosecuting authorities responsible for investigating major transportation accidents and criminal offenses must coordinate their efforts. The TTSB and the THPO are actively encouraging interdisciplinary cooperation and practical interaction in order to jointly preserve the nation's rights and interests in accordance with societal expectations.

II. Problems

Rather than evaluating blame or culpability, the TTSB's examination of Major Transportation Occurrences focuses on discovering what went wrong in order to prevent such occurrences from occurring in the future. If a major transportation accident occurs involving fatalities, prosecutorial entities will intervene in the inquiry to ascertain the cause of the accident and whether someone should be held criminally accountable, as well as to pursue their criminal liability. The TTSB and prosecutors frequently hold opposing viewpoints on evidence collection, preservation, and use. As a result, it's critical to avoid disagreements and develop an unspoken, tacit agreement on collaboration.

III. Status Quo

(I) THPO has established the Taiwan Transportation Safety Board and prosecuting authorities' Investigation of Major Transportation Occurrence and Prosecutorial Investigation of Criminal Responsibility Liaison and Assistance Supervision Unit, and created a liaison and contact platform

On October 8, 2021, the THPO met with the TTSB at a jointly convened meeting which determined to establish the Taiwan Transportation Safety Board and prosecuting authorities' Investigation of Major Transportation Occurrence and Prosecutorial Investigation of Criminal Responsibility Liaison and Assistance Supervision Unit, as of October 18, 2021. This would serve to integrate the District Prosecutor's Office Public Affairs Officers as the single point contact window, for the Taiwan Transportation Safety

Board and prosecuting authorities' Investigation of Major Transportation Occurrence and Prosecutorial Investigation of Criminal Responsibility Liaison and Assistance Platform, along with a telephone directory of the points of contact, which directory has been distributed to the TTSB and all appropriate District Prosecutor's Offices, the Fukien Kinmen District Prosecutor's Office, and the Fukien Lienchiang Prosecutor's Office, fostering use for their operational contact.

(II) THPO and TTSB have jointly held the Taiwan Transportation Safety Board and prosecuting authorities' Operational Contact Symposium

To enhance mutual understanding among the TTSB and prosecutorial entities, advancing operational liaison and contact, THP on December 30, 2021, deployed at the TTSB International Conference Center to jointly convene with the TTSB to host the Taiwan Transportation Safety Board and prosecuting authorities' Investigation of Operational Contact Symposium. This event marked the first time that the TTSB and the prosecutorial offices met to conduct professional exchanges on administrative prevention and judicial prosecution of major transportation occurrence investigation from the viewpoints of administrative prevention and judicial prosecution, respectively, opening up a future cooperation model to strengthen the capacity for incident re-creation and early discovery of the truth at the scene of major transportation accidents.

The meeting introduced the history of the establishment of TTSB, its operational mechanisms, organizational structure, and operational procedures deployed in transportation accident investigation, so that prosecutors can better understand the TTSB operational mechanisms and investigation procedures. The TTSB also presented on the Fuxing Airlines Nangang air disaster occurrence and the Taroko incident as examples to share on experiences of cooperation between the TTSB and the judiciary, in the spirit of respecting each side's authority, communicating and coordinating with each other to ensure complete cooperation in accident scene control, evidence storage, information disclosure and information security protection, thereby facilitating the completion of their respective duties. In addition, we will discuss the legal and practical aspects of major disaster response in Taiwan, and the differences between the TTSB and the prosecutor's

office in the investigation of major transportation accidents and criminal investigations. In addition, the TTSB and the prosecutors proposed strategies to improve cooperation at the national level in the areas of disaster scene handling, evidence collection and mutual sharing principles, and the boundaries for releasing information on transportation accident investigations under the principle of non-disclosure of investigations.

TTSB and prosecutorial entities will also enjoy a frank two-way exchange of views to enhance mutual understanding and cooperation through ample dialogue. TTSB also arranged visits to the TTSB wreckage disassembly and re-assembly room, animation display room, CVR lab, and FDR lab to ensure prosecutors understand more about TTSB investigation procedures and identification efforts.

Taiwan Transportation Safety Board and prosecuting authorities' Operational Contact Symposium

IV. Future Outlook

（I）Periodic or occasional seminars and workshops for further exchange of views

TTSB and prosecutorial entities have our own professions and responsibilities in the investigation of major transportation occurrences and conducting criminal investigations. It is only through improvement of these coordination and liaison mechanisms, allowing full understanding and communication with each other, and respect for the authority of each side, that we can work together to resolve challenges. Thus, besides communication through the aforesaid coordination and liaison platform, periodic or occasional seminars and symposiums are frequently held to facilitate our exchange of professional opinions, assuring efficacious use of each other's expertise and jointly improving administrative prevention and judicial prosecution in major transportation occurrence investigations.

（II）Full communication and implementation of the principles governing crime scene management and evidence preservation, and mutual sharing in major transportation occurrences

When there is a major transportation accident occurrence, the first priority is always to save the lives of the injured, but since there is only one crime scene and body of evidence, evidence is subject to spoliation. Hence, it is also imperative to take into account the root cause investigation and criminal investigation of transportation occurrences without hindering the first responders rescue response to the disaster. Thus, TTSB has worked with the Ministry of Justice to jointly release the Operational Guidelines Regarding Investigation of Major Transportation Occurrence and Prosecutorial Investigation of Criminal Responsibility Liaison and Assistance between the Taiwan Transportation Safety Board and Prosecutors Offices, clearly stipulating the principles governing scene management for major transportation occurrences and evidence preservation and mutual sharing. So, TTSB and prosecutorial entities endeavor to amply communicate and cooperate in their distinctive duties, to realize these principles and complete our respective work responsibilities.

(III) Full communication and implementation of the principles governing crime scene management and evidence preservation, and mutual sharing in major transportation occurrences

Pursuant to the authority of Article 8 of the Transportation Occurrences Investigation Act: "the TTSB shall be the sole competent agency to release the information related to the in-vestigation of transportation occurrences under this Act, except for the information falling under the competence of the other authorities concerned. In the course of the investigation of transportation occurrence, the TTSB shall release, whenever appropriate, the information related to the investigation. " Under the principle of prosecutorial investigation confidentiality, it is up to the TTSB and prosecutorial entities to ensure they coordinate, communicate, and cooperate in order to achieve the objectives of protecting the public interest and to precisely define the boundaries for properly releasing information concerning major transportation occurrences.

V. Conclusions

Judicial investigation and trials of major transportation occurrences necessarily involve interdisciplinary issues of investigation and identification of the root causes of the accident. So for judicial prosecution of major transportation occurrences and administrative prevention of their recurrences, cross-disciplinary cooperation is required to ferret out the truth and to avoid overreaching beyond our proper responsibilities. We aspire that for the future, we will continue working closely with each other to establish better coordination and liaison mechanisms to ferret out the truth, protect the rights and interests of the nation, achieve justice, and create a win-win situation for all.

Conducting Convicted Case Review Committee Operations

pexels-charlie-solorzano-1762815 /www.pexels.com/zh-tw/photo/1762815

Lin, Tai-Li *

---

* The author, who wrote this Chapter in 2021, then serving as a Head Prosecutor of this offices.

I. Preface

On May 16, 2017, the Ministry of Justice submitted a report[1] on the sixth meeting of the National Conference on Judicial Reform, Subgroup I, "Review of the Mechanism for Conducting Convicted Case Review". Among them, the "IV. Possible Reform Plans" pointed out that: 1. We need to improve the channels for remedial relief to avoid injustice and oppression. The prosecutor's office will set up a review board to examine whether there is a need to re-evaluate confirmed guilty cases, and whether there are new facts, new evidence, or whether the verdict is contrary to the law. 2. Incorporate external perspectives to advance the public trust. The Convicted Case Review Committee shall be composed of members including representatives from the prosecutors, forensic experts, criminal law scholars, lawyers, and retired judicial officers' sectors. To ensure broad opinions from all sectors, the number of members of the group who are not prosecutors shall not be any less than one-half of the total number of members, for the sake of ensuring and advancing the public trust. 3. There shall be joint efforts with lawyers' groups and civic organizations to ensure more correct decisions. The relevant groups or organizations (including regional bar associations, national bar associations, and others established for the purpose of protecting justice and human rights) may submit written submissions with reasons thereas, if they deem it necessary to urge the examination of any confirmed guilty case to determine actual guilt. In order to clarify those aspects of the case which are in controversy, the Review Committee shall discuss in detail and examine whether there are any reasons affecting the final verdict warranting a need to file a motion for a retrial or an extraordinary appeal (coram nobis).

II. Guidelines for the Review of Convicted Cases by the Prosecution

Based on the aforesaid principles, the Ministry of Justice issued a letter dated June 13, 2017, entitled " the Guidelines for the Review of Confirmed Cases by Prosecution Agencies " ("the Guidelines"). In accordance with point 3 of these Guidelines, the Taiwan High Prosecutors Office ("THPO") established the " Convicted Case Review Committee " (hereinafter referred to as "Review Committee"). Since its establishment in 2017 until as of July 2021, the THPO has received such 47 cases (of which 35 have since been closed). After one year in operation, the

1. https://www.moj.gov.tw/Public/Files/201706/761102850981.pdf

Ministry of Justice amended the main points of these Guidelines on July 24, 2018, and the key points of the amendments are as follows: 1. To add that when the THPO Chief Prosecutor agrees that the government agency (mainly the Control Yuan) may be the proponent of a determination of guilt (Article 4, Clause 1, Paragraph 3). 2. The Chief Prosecutor of the THPO may also assign a prosecutor to issue a written opinion to initiate the Convicted Case Review (Clause 7, Paragraph 2).

III. Adjustment of the procedures of the "Convicted Case Review"

Since Chief Prosecutor Hsing took over the office on March 11, 2020, he has attached great importance to this responsibility. On September 16, 2020, the Control Yuan, the Ministry of Justice, the Judicial Reform Foundation, the Taiwan Innocence Project, the Taipei Bar Association, the Taiwan Bar Association, and the Taiwan Association for the Advancement of Judicial Human Rights and other organizations to discuss and gather opinions on how to improve the operation of the Review Committee. It was decided that the Taiwan High Prosecutor's Office should first adjust the procedures of the Review Committee as follows: 1. With the extreme exception of apparent innecessity, a Review Committee shall be convened. 2. Before convening a Review Committee, the proponent or the victim may be invited to submit written comments before the meeting, and the proponent shall be invited to designate a representative or the victim's designated agent to attend the Committee meeting to express his or her views.3. Although this Article has not been amended, the original prosecutor shall recuse himself/herself from the case and shall not serve as the officer in charge of the case to determine guilt.

IV. The proposed amendments to the " Guidelines for the Review of Confirmed Cases by Prosecution Agencies″

In order to implement the aforementioned resolution of September 22, 2020, the Taiwan High Prosecutors' Office convened a meeting on February 25, 2021 to discuss the possible inadequacies of the main points in the actual operation of the Guidelines for the Review of Confirmed Cases by the Taiwan High Prosecutors Office and subordinate Prosecution Offices. Based on the conclusions of the meeting, the Taiwan High Prosecutor's Office has prepared

draft amendments to these Guidelines (see Appendix),[2] the main points of which are as follows: 1. The proposer and the person subject to the judgment may request to investigate the evidence and be present at the Review Committee meeting to present their opinions. 2. If the Taiwan High Prosecutors Office is not the prosecutorial entity corresponding to the Court which originally determined a final guilty verdict, then the original prosecutor's office shall detail a prosecutor to express their opinion on the petitioner's submission and to present their opinion at the Review Committee meeting, to clarify the case and any points in contention as quickly as possible. 3. In order to ensure the objectivity and neutrality of the examination process, the original prosecutor shall recuse himself/herself.

V. Conclusions

In order to avoid false convictions of the innocent, the judicial authorities shall consider the external viewpoints of the defendant, the victim, human rights and lawyers' groups in controversial cases, and examine them in detail in order to eliminate errors, so as to manifest the objective obligations set forth in Article 2, Paragraph 1 of the Code of Criminal Procedure. At the same time, it is the goal of the Review Committee to preserve the integrity of the judicial remedy and to prevent unnecessary damage to the certainty and security of final judgments.[3] It is hoped that the proposed amendment to these Guideliness will improve the operation of the Review Committee.

2. These proposed amendments were sent to the Ministry of Justice for consideration in April 2021.

3. Same as Note 1.

Appendix

Guidelines for the Review of Convicted Cases by Prosecution overall Description of the Proposed Amendments

The " Guidelines for the Review of Confirmed Cases by Prosecution Agencies " ("the Guidelines") were established and published on June 13, 2017, and were amended on July 24, 2018. From 2017 and as of December 2020, more than half of the confirmed review cases are handled by courts of jurisdiction other than the Taiwan High Court. To clarify the facts of the case and the legal issues, it is appropriate for the corresponding original prosecutor's office to prepare the opinion and present it at the meeting, and to fully participate in the review meeting so that the conclusion of the review can be implemented with clarity. In order to ensure the operation of the Review Committee is more thorough, the relevant procedures are to be adjusted accordingly, with amendment to the Articles as suggested, the main points of which are as follows:

I. Definition of terms used in this point. (The second point in the amended provisions)

II. The proponent and the recipient of the judgment (defendant) may request to investigate the evidence and present their opinions at the time of the examination of the (the Review Committee). (Points 5 and 8 of the amended regulations)

III. If the Taiwan High Prosecutor's Office is not the prosecutor in charge of the determination of guilt case, the original prosecutor's office shall assign a prosecutor to express his or her opinion on the submission of the proposer and present his or her opinion at the meeting in order to clarify the facts and issues of the case in an appropriate manner. (Amendment of the fifth and ninth points of the regulations)

IV. To ensure the objectivity and neutrality of the examination process, the provisions for recusal of the original prosecutor are added. (Amendment of the seventh point)

V. The implementation of the conclusions of the Review Committee. (Point 11 of the amended regulations)

Founding and Prospects of the Intellectual Property Branch of the Taiwan High Prosecutors Office

Chen, Wen-chi*

---

* The author, who wrote this Chapter in 2022, then serving as a Head Prosecutor of this offices.

I. Preface

Intellectual Property Rights ("IPRs") are the fruits of human spiritual activities, involving the fields of Patents, Trademarks, Copyrights and Trade Secrets. After "intelligence" has been turned into rights, IPRs become not only the wealth of the people who own them and the items of corporate governance, but also the tools of industrial R&D and market development, which are closely related to the competitiveness of corporates and countries. Thus, countries are paying more and more attention to the protection of IPRs.

To protect IPRs in a more professional and effective manner, countries are considering how to establish and improve their litigation systems for IPRs protection. In the Philippines, a special court for IPRs cases was established in 1995 and incorporated into the Special Commercial Court in 2003. The Central Intellectual Property and International Trade Court was established in Thailand in 1997. The Patent Court of Korea was established in 1998. The Intellectual Property High Court was established in Japan in 2005. At the end of 2014, the Intellectual Property Courts were established in Beijing, Shanghai and Guangzhou in mainland China. In December 2018, the Standing Committee of the National People's Congress approved the establishment of an intellectual property court in the Supreme People's Court, which was inaugurated on January 1, 2019. For those countries which have not yet set up professional courts, most of them handle IPRs cases by means of specialized courts or specialized personnel.

In response to the developing trends of protecting IPRs and to enhance the professional efficiency of courts and prosecutors offices in handling intellectual property ("IP") cases, in February 2004, Taiwan started its preparations for the establishment of the Intellectual Property Court ("IPC"). The Intellectual Property Case Adjudication Act and the Intellectual Property Court Organization Act were passed on January 3, 2007 and March 3, 2007, respectively. These two laws were promulgated on March 28, 2007 and took effect on July 1, 2008. In accordance with Article 5, Paragraph 1 of the Intellectual Property Court Organization Act, the Intellectual Property Branch of the Taiwan High Prosecutors Office ("THPO-IPB") was established on July 1, 2008 to correspond to IPC, as the second instance prosecutors office, and is currently the only

professional prosecutors office. The specialized court and prosecutors office are conducive to maintaining consistent standards of prosecution and trial, uniformity of legal opinion, and judicial economy in litigation.

II. Establishment of THPO-IPB

IPC is in charge of the trial of the first and second instance civil matters, and second instance criminal cases and administrative litigation, while the Prosecutors Office and IPC only correspond to the second instance criminal cases and public prosecution-related matters. Giving due consideration of organizational streamlining, case volume, business supervision and sharing of administrative resources, THPO-IPB was initially established as a Branch of the Taiwan High Prosecutors Office ("THPO"), on the same day as IPC on July 1, 2008. Thus, the litigation system for IPRs protection entered a brand-new stage.

At the beginning of the establishment of THPO-IPB, it was established with minimal resources in terms of the office space, the staff budget, and business procedures for its responsibilities. According to the Schedule attached to Article 5 of the Intellectual Property Court Organization Act, the statutory staff of THPO-IPB includes a Chief Prosecutor, Head Prosecutor, Prosecutors, and Prosecutor's Investigators, Clerks and Bailiffs, with a total personnel complement of 30 staff. However, given the staffing and total staffing limitations since its establishment until the present (December 2021), the Chief Prosecutor and the Head Prosecutor are both concurrently Chief Prosecutor and the Head Prosecutor of THPO, with only 8 staff members in the establishment. The rest of the staff are mostly seconded from THPO or supported in a part-time manner.

The office was initially located on the 5th floor of the National Communication Commission's North District Office Building at No. 143, Yanping South Road, Zhongzheng District, Taipei City. In September 2019, the office was relocated to the 5th floor of No. 164 Bo-ai Road in the same district to accommodate the space allocation adjustment of THPO, and has more complete office space. Since IPC is located in Banqiao District, New Taipei City, the prosecutors have to travel across administrative districts to New Taipei City to conduct prosecutions before the

court (2 days during the litigation period), and there is another prosecutor's office in IPC for prosecutors to use when they are preparing the appearing in court.

In the Judicial Reform Conference in 2017, in order to handle major commercial disputes expeditiously, professionally and appropriately, a separate Commercial Court was decided to be established and merged with IPC to become the Intellectual Property and Commercial Court ("IPCC"). On December 17, 2019, the legislation of the "Commercial Case Adjudication Act" and the amendment of the "Intellectual Property Court Organization Act" to become the "Intellectual Property and Commercial Court Organization Act" were completed. The Intellectual Property and Commercial Court Organization Act was promulgated on January 15, 2020 and took effect from July 1 of the same year. IPCC was established on the same day. However, IP cases handled by the former IPC remain unchanged, so these matters did not affect THPO-IPB prosecutors' responsibilities to conduct prosecutions before the court.

III. Official Responsibilities

The focus of THPO-IPB responsibilities include: conducting prosecutions before the court, reviewing reconsideration cases, business supervision, education and training, research on legal issues, and international and cross-strait exchanges and cooperation.

(I) IP Cases - Second Trial Public Prosecution and Reconsideration Cases

1. IP Cases and Jurisdiction

The core business of THPO-IPB is to conduct prosecutions before the court and to review the reconsideration cases. The jurisdiction of the cases is assigned by type, to achieve the effect of professional division of labor and unified interpretations of laws.

The forepart of Article 5, Paragraph 1 of the Intellectual Property and Commercial Court Organization Act stipulates that "The Taiwan High Prosecutors Office, Intellectual Property Branch shall be set up as the corresponding authorities of the Intellectual Property and Commercial Court". In Article 5 Paragraph 2, it prescribes that, " Prosecutors of the Prosecutors Office of district courts and branches thereof handle

criminal cases prescribed in Subparagraphs 2 and 4 of Article 3; the Chief Prosecutor of the immediately supervising Prosecutors Office shall be the Chief Prosecutor of the Taiwan High Prosecutors Office, Intellectual Property Branch." Therefore, the territorial jurisdiction of THPO-IPB exceeds that of the THPO and its subordinate prosecutors offices, to include the areas of Kinmen and Lienchiang in Fukien. The IP cases investigated by each district prosecutors office and appealed to IPCC after the judgment of the first instance following public prosecution, are handled by THPO-IPB prosecutors in the public prosecution of the trial of the second instance. The cases that are applied for reconsideration following non-prosecution decision or deferred prosecution decision made by the prosecutors in each district prosecutors office, are reviewed by THPO-IPB.

With regard to subject matter jurisdiction, in accordance with Article 3, forepart of subparagraph 2 and subparagraph 4 of the Intellectual Property and Commercial Court Organization Act , and Article 25, Paragraph 2 of the Intellectual Property Case Adjudication Act, the scope of IP cases includes:

（1）Offenses on forged or counterfeiting trademarks or trade names in Article 253 of the Criminal Code, or Offenses on offering, displaying or importing to sell goods with forged or counterfeited trademarks or trade names in Article 254 of the same Code or Offenses on falsifying labeling of goods or displaying or importing such falsely labeled goods in Article 255 of the same Code.

（2）A violation of Article 317 by disclosing commercial or industrial secrets obtained in the course of an occupation, or violating Article 318 by disclosing a commercial or industrial secrets obtained in one's public duties.

（3）Any criminal violations of the Trademark Act, Copyright Act, or Trade Secrets Act.

（4）Any violation of a confidentiality preservation order issued pursuant to Article 35, Paragraph 1 or Article 36, Paragraph 1 of the Intellectual Property Case Adjudication Act.

（5）Other criminal cases related to the aforementioned cases, which are appealed or lodged for reconsideration after being sentenced together by the District Court or

giving a non-prosecution decision together by the prosecutor.

Among them, a trial of the second instance in criminal cases involving violations of the “Confidentiality Preservation Order” “issued by the court for trade secrets cases was under the jurisdiction of IPCC and THPO-IPB. However, the Trade Secrets Act was amended and promulgated on January 15, 2020, creating a new system of "Investigation Confidentiality Protective Order" issued by the prosecutor during the prosecutorial investigation. On January 17 of the same year, the new system came into effect, and violating the investigation confidentiality protective order is considered to be contempt of justice and also carries criminal penalties. Because the legislation was adopted later, although such violation was not listed as the case under the jurisdiction as the violation of court's " Confidentiality Preservation Order", before any further amendment to the law, it should be interpreted as a violation of the Trade Secrets Act as referred to in the above-mentioned (3), and is under the jurisdiction of IPCC and THPO-IPB.

The public prosecution of the second instance and reconsideration of criminal cases related to IP cases are also handled by THPO-IPB, and the contents of such cases are very diverse. For example, fraud may be suspected in the sale of counterfeit goods, trademarked pharmaceutical products may violate the Pharmaceutical Affairs Act, and criminal gangs selling CDs may violate the Organized Crime Act.

In 2013, a food safety case turned into a high-profile case, in which A company palmed off low-priced oil as imported olive oil by adulterating "Copper Chlorophyll" for coloring, and sold these oils to B Company which then added them to OEM products made for C Company and these products were then sold to the market. Since the case involved falsely labeled goods (Article 255 of the Criminal Code), the case was appealed to IPC for trial before the jurisdictional amendments, and public prosecution was conducted by THPO-IPB prosecutors. The case subsequently resulted in a guilty verdict and the criminal proceeds were confiscated, making it the first successful confiscation case filed by a prosecutor after the new Criminal Code confiscation system took effect from 2016. After the new law was passed by the legislature, THPO-IPB immediately conducted

an inventory of the defendant B Company's property and calculated the amount of the criminal proceeds. On July 1, 2016when the New Criminal Confiscation System took effect, an application was lodged with IPC for confiscation of property, and was approved by the Court, allowing the defendants to be convicted and for confiscation of the criminal proceeds.

2. Unique Characteristics of IP Cases

（1）Heavy Qualitative Cases

Although the number of IP cases does not account for a high percentage of the total number of criminal cases, the qualitative aspects of these cases is very heavy in general. According to the statistical data, during the decade from 2011 to 2020, the total number of people investigated and concluded by all district prosecutors offices was 5,488,440, among which there were 92,345 persons of IPRs cases investigated and concluded, accounting for 1.7% of the total number of general criminal cases. Among them, violations of the Copyright Law (54.3%) were the most frequent, followed by violations of the Trademark Law (41.5%), which together accounted for 96%. Because of the heavy qualitative aspect of these cases, the average number of days to close each IPRs case was 65.9 days, which was 14 days longer than the average 51.9 days in general criminal cases. Among them, the longest time was 154.2 days for cases involving violations of the Trade Secrets Act.[1]

（2）High Professionalism

When prosecutors handle IP cases, they are dealing with judges specializing in IP cases, and they often encounter attorneys or advocates who specialize in IP matters. In addition, cases often involve inter-disciplinary technical, design, or industrial expertise, requiring the introduction of a variety of professionals to assist prosecutors in making proper investigations and judgments. IPCC has technical examiners who specialize in various technical areas as an adjunct adjudicative mechanism for IP cases. In addition to obtaining examinations and analytical opinions of professionals

1. Source: Ministry of Justice Global Information Network Inspection Statistics, Ministry of Justice March 2021 Statistical Analysis of IPRs Infringement Cases.

with special knowledge or experience through forensic evidence, the prosecutors also need to have an expert consultation system and supportive manpower, to enhance accuracy in prosecutions.

（3）Ever-Changing Crime Patterns

As technology advances and the Internet develops rapidly, the methods and forms of IPRs infringement are also constantly changing. For example, copyright infringement has shifted from paper, CD-ROM, or other forms of piracy of physical carriers to digital infringement through over-the-top media services ("OTT"), digital cloud space, and network devices. This trend of change also shows the conclusion of the investigation of IPRs infringement cases by district prosecutors offices over the past 10 years from 2011 to 2020.. Of the 92,345 persons investigated and concluded, those involved in computer crimes increased from 27.7% in 2011 to 51.1% in 2020, for an increase of 23.4 percent in the decade.[2] Among the aforementioned investigations concluded, the number of persons who violated trademark law decreased from 47.5% in 2011 to 35.9% in 2020, evincing a decreasing trend. On the contrary, the number of copyright violators gradually increased from 51.1% in 2011 to 56.6% in 2020. The Trade Secrets Act was amended in 2013 to provide for additional penalties for infringement of trade secrets, and in 2014, the number of cases in violation of the Trade Secrets Act accounted for only 0.6% of IP cases, but this has increased significantly to 3.9% in 2020[3], a six-fold increase in the number of cases.

The change in the above data indicates the changing landscape in prevalent type of cases. The protection of trade secrets and the fight against digital infringement, which are quite closely related to the development of advanced technology and industrial competition, are both hot topics now. Not only must our law enforcement keep pace, but also the professional training of our prosecutors must be concomitantly upgraded.

2.Source: Statistical Analysis of IPRs Infringement Cases, March 2021, Ministry of Justice.

3.Ibid.

（4）Cross-border crime requires judicial cooperation

The rise of the Internet and the ease of cross-border circulation of people, goods, finance, and information, have made it more difficult for law enforcement agencies to investigate and collect evidence, track down fugitives, recover illegal gains, and prevent or prosecute crimes, especially when the place of infringement, locus of results, or evidence are located extraterritorially. In order to effectively protect IPRs and combat digital infringement, cross-border judicial cooperation is absolutely necessary to achieve success.

（II）Business Supervision and Coordination

THPO-IPB supervises IP cases handled by district prosecutors offices in accordance with the authority and responsibility of higher-level prosecutors offices as stipulated in the Code of Criminal Procedure and based on the principle of "unity of the prosecutorial entities". Through the review of reconsideration cases, periodic business inspections, or discussions with prosecutors in charge of cases and the provision of assistance in handling the cases, THPO-IPB carefully strives for proper investigations and consistent standards of prosecution, to improve the quality and efficiency of prosecutors in handling IP cases.

For crimes that cross the jurisdictions of different district prosecutors offices, or cases that are complex or involve serious damages, THPO-IPB also plays a role in coordinating the prosecution and police teams. For example, for the purpose of cracking down on illegal sources of digital set-top boxes, THPO-IPB, in collaboration with the district prosecutors offices, the Criminal Investigation Bureau and the Second Special Police Corps, launched “Jing Yuan Operation” on January 10, 2019, which was carried out simultaneously in six counties and cities, including Taipei, New Taipei, Taoyuan, Taichung, Tainan City and Pingtung County. The interdiction effort aimed at investigating and arresting those who violate the Copyright Law and those who provide funds for money laundering crimes, and seized a large number of machines and equipment used for crimes and the scale of computer server rooms seized was the largest ever.

In addition to the internal supervision of the prosecutorial system, THPO-IPB has a

"Coordination and Supervisory Working Group on Combating Intellectual Property Rights Infringement " with the Chief Prosecutor as the convener, to coordinate and integrate the Intellectual Property Office under the Ministry of Economic Affairs, the Joint Optical Disk Enforcement Task Force, the Ministry of Education, and the National Communications Commission,, Customs Administration under the Ministry of Finance, Bureau of Audiovisual and Music Industry Development under the Ministry of Culture, , National Police Agency under the Ministry of Interior, Investigation Bureau under the Ministry of Justice, and prosecutors offices to solve problems and investigate illegal activities through administrative measures, criminal prosecution, and education and promotion dimensions, and strengthen the cooperation among various agencies of law enforcement to protect IPRs.

（III）Research and Training

IP cases are highly professional, commercial, and international in nature, and various new types of IPRs crimes are always emerging, so legal amendments and jurisprudential opinions are also constantly changing and developing. To enable all prosecutors, prosecutor's investigators, and judicial police officers handling IP cases to improve their case handling skills, enforce the law appropriately, apply the law correctly, grasp court opinions and theoretical developments, and ensure the standards of prosecution are consistent, THPO-IPB has established the "Reference Standards for Specific Sentencing in Intellectual Property Criminal Cases" and the "Enforcement Standards for Set-top Boxes". THPO-IPB also participated in the discussion of the revision process of the Trade Secrets Act and assisted the Ministry of Justice in promulgating the "Notes for Prosecutors Handling Cases of Violations of the Trade Secrets Act". In addition, in 2018, the "IP Case Study Program" was developed to provide training courses for prosecutors and police officers, to prompt the points and share the experiences in handling cases.

Additionally, THPO-IPB also holds or participates in international and cross-strait seminars on IPRs issues. To in line with international path of the protection of trade secrets and prevention of digital infringement, and to strengthen the partnership and share professional knowledge, in 2020 and 2021, under the Global Cooperation and Training

Framework (GCTF), the Ministry of Foreign Affairs, the THPO, the American Institute in Taiwan (AIT), and the Japan Taiwan Exchange Council (JTIC) co-hosted virtual international seminars which were planned and implemented by THPO-IPB. Every year with over 100 experts and law enforcement officers participated in the discussions from more than 20 countries to share their professional knowledge. On the other hand, the Chief Prosecutor has led prosecutors in many legal advocacy seminars with industry on the topic of trade secrets protection. Through this dialogue among the judiciary, the administration and industry, new information is obtained, theory and practice are accumulated, and case handling competencies are strengthened.

（IV）International and Cross-Strait Exchanges and Cooperation

IP cases often involve cross-border and foreign elements. In practice, the infringed enterprise, the relevant perpetrator and the place where the crime was committed may be related to the United States, Japan, Europe and other countries or mainland China. Hence, international and cross-strait law enforcement exchanges and cooperation are necessary for the effective prosecution of crimes through offshore investigations and evidence collection.

As for the modes and means of cooperation in law enforcement outside Taiwan, mutual legal assistance agreements or individual case consultations can be undertaken to obtain assistance in investigation and evidence collection or to conduct joint investigations. THPO-IPB often conducts business exchanges or working meetings with other law enforcement partners. Before a formal request for mutual legal assistance or joint enforcement is made, there are often preliminary discussions to establish a consensus of trust and further advance the cooperation.

In addition to the Taiwan-U.S. Mutual Legal Assistance in Criminal Matters Agreement signed in 2002, which provides a legal basis for mutual legal assistance between Taiwan and the U.S., in order to strengthen cooperation in combating IPRs infringement and trade fraud crimes, a MOU Between TECRO and AIT on Intellectual Property Rights Enforcement Cooperation was signed in 2017, which designated THPO-IPB as Taiwan's contact point.

In 2018, the “Work Plan on Digital Anti-Piracy " was jointly completed to strengthen cooperation on enforcement of digital piracy abroad.

The Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement was signed on April 26, 2009, and took effect from June 25 of the same year. The “Cross-Strait Intellectual Property Right Protection Cooperation Agreement" was signed on June 29, 2010, and took effect from September 12, 2010. They are the legal bases for cross-strait cooperation in combating crime and protecting IPRs. In 2019, for the first time, a delegation from a mainland People's Procuratorate visited THPO-IPO to exchange information on intellectual property protection issues.

IV. Protecting Intellectual Property - Relationship to Trade and Investment, Advanced Technology Development

Protection of IPRs has always been one of the most important considerations in international trade and investment, and is also an issue of concern for international economic and trade consultations. In recent years, the U.S. annual investigation reports on Section 301 of the Trade Act have recognized Taiwan's efforts and effectiveness in the legal and enforcement aspects of IPRs protection. IPRs protection has also been included as a topic of consultation at the Taiwan-U.S. Trade and Investment Framework Agreement (TIFA) meetings. On June 30, 2021, the representative from THPO-IPB attended the TIFA meeting to explain the effectiveness of enforcement on trade secrets protection and digital infringement issues as concerned.

Since the U.S. launched a trade war with mainland China in 2018, the issue of IPRs has been highlighted. Theft of intellectual property, forced technology transfer, and cyber security are listed as the priority issues in the trade negotiations between the United States and China. Among these issues, advanced and sensitive key technologies are of concern to all countries because they are related to industrial development and economic leadership, and may even become a national strategic security issue. One of the keys for Taiwan to become the first choice in the supply chain of global technology majors is the protection of IPRs and trade secrets, which not only allows industry players to develop and innovate with peace of mind, but also encourages investors (foreign investors) to dare to invest.

V. Improving Prosecutorial Functions for IPRs Protection

Over the past 30 years, Taiwan has been facing and responding to international economic and trade consultations on IPR, and has gradually built up a legal framework and enforcement capabilities for IPRs protection. In the past 13 years since the establishment of THPO-IPB,the importance of the Office, the professional ability of the staff, and the effectiveness of the case-handling have been gradually and visibly presented as the result of prosecutors' efforts. To encourage future success, the following suggestions are offered:

(I) In response to organizational changes in professionalization of the courts and the professional requirements of the ouside world for cases, the personnel and resources of THPO-IPB should be properly allocated as soon as possible. With the adequate manpower, sufficient time and support, THPO-IPB will be able to perform its investigation and prosecutionfunctions with in-depth expertise and accumulated experiences.

(II) To strengthen the functions of business supervision, education, training, and legal research between the district prosecutors and THPO-IPB, and to improve the quality and effectiveness of prosecutors in handling IP cases.

(III) Prosecutors and Prosecutor's Investigators should keep pace with the changes and developments in technology, industry, and business models, and improve inter-disciplinary knowledge.

(IV) To promote international exchange and cooperation and to make good use of international mutual legal assistance to facilitate the investigation and collection of evidence outside the country and to effectively prosecute cross-border crimes.

(V) In conjunction with the Intellectual Property Bureau of the Ministry of Economic Affairs to improve measures and systems for the protection of IPRs , including legislation and litigation systems, and assist enterprises in establishing IPRs protection mechanisms.

lounge for litigants

VI. Conclusions

THPO-IPB upholds to the spirit of "handling IPRs infringement cases with more profession to implement IPRs protections, promote industrial development and enhance national competitiveness," so that IPRs can be fully protected with ample coordination of the public interest.

pexels-charlie-solorzano-1762815 /www.pexels.comzh-twphoto1762815

Our humble opinions on the present stage of the development blueprint for the Taiwan High Prosecutors' Office

Li, Yu-Shuang*

Ting, Chun-Cheng

* Prosecutor, Li, Yu-Shuang and prosecutor, Ting, Chun-Cheng , then serving as Prosecutors of this office, wrote this Chapter in 2021.

I. Preface

The Taiwan High Prosecutors Office (THPO) has experienced the efforts over the years of our Chief Prosecutors to govern and work together with colleagues, and their various rules and regulations have been well prepared and laid a sound, quality foundation. Looking ahead, it is the most important task at this stage to carry on from the past and keep improving, and to keep up with the times in planning the development of the THPO.

II. Feasible solutions

In response to the expansion of THPO's volume of official responsibilities and frequent personnel turnover in recent years, how to efficiently engage in transmission of experience and reduce colleagues' workloads depends on establishing appropriate systems, for which feasible solutions are offered for discussion as follows:

(I) Deepening organizational Know-How in response to personnel reforms

Since 2018, the Ministry of Justice has implemented the "trial of the first and second instance prosecutor rotation" system, which has brought unprecedented personnel changes to the THPO. As a result, a large number of short-term (commonly known as "second-year" or "third-year" prosecutors, hereinafter "experienced prosecutors") have joined the THPO as "new blood", creating a very different organizational style and culture than before. With the rapid turnover in prosecutors, how new prosecutors can progress from novice to expert in the shortest possible time is a critical test of whether the THPO training mechanisms are sound and effective.

Additionally, the experience and know-how accumulated by these experienced prosecutors during their time in the Office is easily lost with such staff changes. So, if the former personnel operation mode continues as such, there may be a serious shortage of experienced senior THPO prosecutors, and they may face the dilemma of not being able to pass on their experience in handling cases. Hence, it is necessary to consider how to actively establish a mechanism to effectively pass on their experience so that the THPO can more smoothly fulfill its' responsibilities. In addition to the THPO's current efforts to revise

the "Trial of the Second Instance Prosecutor's Manual", the THPO's Editorial Training Group can also create compilations of common case types for use by new prosecutors to shorten their learning curve.

Moreover, the THPO can regularly collect special or difficult problems encountered by prosecutors in handling cases, organize them into categories, create a concise index, and establish an online "THPO Case Information Database" for all prosecutors to use.

（II）Reducing the workload

How to effectively use any organization's resources in the most productive areas is the key to the success or failure of that organization's development. In addition to their court appearances and court work duties, the THPO prosecutors must invest a lot of time and energy in their work, often leaving them feeling quagmired in piles of papers. So beside creating easy-to-find and diverse types of draft pleadings, an adjunctive information system can help prosecutors reduce their time spent on searching for reference books and facilitate using electronic files for citing authorities and contents and drafting pleadings and motions requesting reconsideration, all of which will help reduce prosecutors' work burdens.

（III）Establishing a benchmark for deferred prosecution review

In 2020, there were 35,683 deferred prosecution cases in the District Prosecutor's Offices nationwide. Prosecutors of the District Prosecutor's Offices are well aware that the leniency of the conditions for deferred prosecution are of great importance to the rights and interests of the parties involved in the cases, and these are also the focus of the THPO's review in deferred prosecution cases.

However, the THPO has not established a benchmark standard for reviewing the conditions governing grants of deferred prosecution, similar to the Judicial Yuan Sentencing Information System, for the reference of prosecutors, resulting in the District Prosecutor's Offices or prosecutors acting with unfettered discretion, so the fairness of each grant can be easily questioned.

Hence, as the THPO considers the different variety of cases, in terms of their relative severity, in conjunction with factors including the policies of the Ministry of Justice and local conditions, over time the standards for determining when to grant a non-prosecution were developed, and thus, this review can ensure fairness in disposing all cases while affording prosecutors of the first and second instance with appropriate guidelines to exercise prosecutorial discretion to decline prosecution, and resolve any differences of opinion or conflicts in the viewpoints among the various levels of review.

（IV）Strengthening exchanging and sharing information between prosecutors in the trials of the first and second instance

In current practice, except for specific cases of corruption and profligacy or cases of major social importance, prosecutors in the trials of the first and second instance lack the opportunity to exchange case information on a systematic basis. Formally, prosecutors in the trials of the first and second instance are in a relay race, one after the other. However, in reality, they are each running their own race, and case information often cannot be effectively transmitted and connected. The prosecutor in the trial of the first instance may have analysis or collation of the case which is not handed over either, resulting in a gap in prosecutorial information and ineffective use of judicial resources.

Thus, it is necessary to establish systemic improvements, ensuring consultation between individual prosecutors in the trials of the first and second instance, sharing the first-instance trial case files (including electronic files such as evidence analysis and PowerPoint presentations) to be efficiently and systematically transferred to prosecutors in the trials of the second instance for reference through the information system, creating a teamwork model, strengthening the capacity of public prosecutions, and truly utilizing the benefits of the relay race among prosecutors in the trials of the first and second instance.

（V）Actively improving prosecutors' working conditions

Each member of the prosecutor's office plays an imperative role in maintaining normal operations of the office. In addition to the increasingly heavy workload of prosecutors, the workload of many support staff, including Clerks, Prosecutor's Investigators, Bailiffs, and

other colleagues, has becoming increasingly heavy. Practically improving their working conditions and creating a friendly workplace environment are directions that THPO is looking forward to working on for the future.

For example, the Clerks have long been compiling pages manually without the help of automated means. The Statistics Office staff cannot quote the prosecutor's case closing documents and must manually input the case closing information one by one. It is necessary to review and improve all these work processes, to eliminate wasting human resources and reducing colleagues' workload given the limited work environment, thus ensuring our human resources can be deployed to their maximum benefit.

III. Conclusions

Although the THPO has an excellent traditional agency culture and operates in an uncompromising manner, it is only through keeping up with the times that this agency culture can continue developing and flourishing.

pexels-steve-johnson-1070536 /www.pexels.comzh-twphoto1070536

pexels-andrea-piacquadio-3769138 /www.pexels.comzh-twphoto3769138

International and Cross-Strait Mutual Legal Assistance

Chen, Wen-chi*

* The author, who wrote this Chapter in 2022, then serving as a Head Prosecutor of this offices.r

I. Preface

As criminal activities have expanded internationally and become organized, prosecutors now face a greater challenge in investigation and evidence collection, fugitive tracking, assets recovery, crime prevention and prosecution. In order to effectively combat crimes, demonstrate justice and maintain order in exchanges, cross-nation (cross-border) judicial cooperation is what it takes to achieve the success. Over the years, Taiwan has cooperated with other countries or regions on many occasions in investigating individual cases, submitting requests assistance from or providing assistance to other countries in investigating and collecting evidence, so that transnational (border) cases can be successfully convicted and friendly relationships between law enforcement agencies have been established. All these progresses have also contributed to the internationalization of the role and functions of procurators.

II. The Role of the Taiwan High Prosecutors Office (THPO)

The contents of international mutual legal assistance in criminal matters include extradition, mutual legal assistance in the narrow sense (assistance in investigation and evidence collection, service of documents, etc.), recognition and enforcement of foreign judgments, transfer of criminal proceedings, transfer of sentenced persons, asset recovery, and other law enforcement cooperation.[1] All these are combined into mutual legal assistance in the broadest sense. The "Mutual Legal Assistance in Criminal Matters Act", passed on third reading by the Legislative Yuan on April 10, 2018, and promulgated by the President on May 2, 2018, regulates mutual legal assistance in a narrow sense. In addition, extradition and transfer of prisoners matters are regulated by the 'Laws of the Extradition" and the "Transfer of Sentenced Persons Act".

International mutual legal assistance in criminal matters involves negotiation and mutual assistance between the Requesting Party and the Requested Party, in which one party performs a specific judicial act on behalf of the other party, and States often treat mutual

1. Chen, Wen-chi, "The Legal Basis of International Mutual Legal Assistance in Criminal Matters and its Legal Framework: A Review of Taiwan's Mutual Legal Assistance in Criminal Matters Act," in Taiwan Prosecutor Review, Vol. 25 (Feb. 2019), pp. 126ff.

legal assistance as one of their most important foreign affairs. Therefore, the practical operation of mutual legal assistance has two aspects: one is external linkage, and the other is domestic implementation. The Ministry of Foreign Affairs (MOFA) is the nation's external contact window so that requests for mutual legal assistance are usually filed with or received from foreign countries via MOFA. If a country has not signed a convention or treaty, it can still make a request through diplomatic channels based on the principle of reciprocity and in accordance with the laws of the requested country. In the legal framework of mutual legal assistance in criminal matters, there usually are contact window and the Central Authority. In the practice of mutual legal assistance-related conventions, treaties, agreements or the basis of reciprocity, nations often set the Judicial Administration or the Supreme Prosecutors Office as their Central Authority. Article 3 of the "Mutual Legal Assistance in Criminal Matters Act" stipulates that the Ministry of Justice (MOJ) is the competent authority for mutual legal assistance matters. However, as far as the routing of such requests is concerned, Article 7 stipulates that in principle, any request for mutual legal assistance shall be filed via the MOFA with the MOJ. However, when there is another contact window otherwise provided by treaty or agreement or in case of emergency, (e.g. when a person is about to flee or evidence may be lost to spoliation), the request may be made directly to the Central Authority (i.e., the MOJ) in order to facilitate the operation of mutual legal assistance.[2] As for the mutual legal assistance with mainland China, Hong Kong and Macau, the provisions of the "Mutual Legal Assistance in Criminal Matters Act" shall be applied mutatis mutandis, with a separately designated authority and duties.[3] In terms of domestic implementation, in accordance with Article 9 of the said Act, the MOFA shall, upon receipt of a request from a foreign country, relay the request to the MOJ for processing. Upon receiving the request and approving it after review, the MOJ shall forward or commission it to an assisting body in accordance with the nature of the request. Since most requests involve the criminal investigation, evidence collection, pursuit of fugitives and recovery of stolen asset, Prosecutors Offices become the primary assisting agencies. The THPO is an important agency for carrying out prosecutorial administrative affairs and supervising cases based on the integration of procuratorates, which has historically played a role in the execution of mutual legal assistance cases.

2. op. cit. at 147ff.

3. See Mutual Legal Assistance in Criminal Matters Act, Articles 35 and 36.

III. Exemplary Case Studies

In addition to extradition treaties and mutual legal assistance treaties or agreements signed with some countries, many case-by-case assistances were provided on the reciprocity basis. The cases handled directly by THPO and the Intellectual Property Branch of the Taiwan High Prosecutors Office (TIHP-IPB) through cooperation mechanisms were as follows:[4]

(I) The Lafayette case - Overseas Investigation and Recovery of Illicit Proceeds

In December 1993, the Navy's Lafayette warship procurement fraud case broke out, revealing corruption and fraud at the top levels of the ruling party, government and military. On July 1, 2000, President Chen Shui-bian publicly declared that the case "must be pursued to its roots, even if it shakes the nation's foundations", and the Supreme Court Prosecutors Office (now the Supreme Prosecutors Office) immediately set up a Special Investigation Unit (SIU), which conducted the investigation, and the prosecutors of THPO were appointed to undertake the case.

To investigate this transnational military procurement fraud case, the SIU has twice tasked prosecutors to flew to France to keep abreast of the flow of the kickbacks and to request mutual legal assistance with Switzerland to obtain information related to the illicit commissions in the Lafayette military procurement. During the negotiation of mutual legal assistance, prosecutors of the SIU and the Taipei District Prosecutors Office made several trips to Switzerland and other European countries to communicate and coordinate judicial cooperation matters, seeking the possibility to conduct an inventory of suspicious accounts and the recovery of illegal commissions. The Swiss Federal

4. Cited from Chen Wen-chi, "The New Role of Prosecutors in the International Community," in Justice Across eras: A Century Review of the Prosecutorial System, published by the Ministry of Justice (May 2008), 298ff.

Court conditionally agreed to cooperate with Taiwan and handed over the information related to the Lafayette case to the judicial prosecutorial authorities of Taiwan, France, and Liechtenstein, in light of our government's commitment to safeguard the defendant's rights to defense and respect the principle of presumption of innocence. After Taiwan guaranteed that the defendants would not be sentenced to death, the Swiss Federal Court agreed to return to Taiwan the money frozen in a Swiss bank account relating to the illicit kickbacks obtained by public officials involved in the case. Since the main defendant Wang Chuan-pu did not appear in court, a declaration of forfeiture attached to a conviction was not obtainable before his demise. It was not until 2015, after the amendment of the asset forfeiture/confiscation provisions of the "Criminal Law", that the prosecutor of Taipei District Prosecutors Office was able to request the court separately for a confiscation order of the proceeds of the crime and was granted confiscation of USD 900,146,887.18 (equivalent to approximately NTD 27.355 billion) and interest by the court.[5] Based on the confiscation order, an application was again lodged with the Swiss authorities, and the money was returned on and another. Our long-term investigation and recovery of stolen asset has yielded initial results.

(II) The United States Secret Service expressed its gratitude for cooperation between Taiwan and the United States in detecting and interdicting counterfeit banknotes[6]

In early 2005, the U.S. government sent officials to Taiwan to request our government's assistance in law enforcement in view of the gap in the international financial order caused by the proliferation of counterfeit U.S. banknotes throughout Southeast Asia. The THPO accordingly established a

5. See the Ministry of Justice press release of July 21, 2017.

6. See the Ministry of Justice press release of January 23, 2008.

Transnational Criminal Investigation Unit (TCIU) to cooperate with the U.S. Secret Service pursuant to the "Taiwan-U.S. (TECRO-AIT) Mutual Legal Assistance in Criminal Matters Agreement", and directed prosecutors, the police, military police, investigators, and customs agents to launch series of investigations. In August 2005, the Kaohsiung Customs Bureau seized over $1.9 million in counterfeit U.S. currency. In September of the same year, the Investigation Bureau seized more than 500 finished and 6,000 semi-finished DB vision of counterfeit U.S. $100 bills in Taichung County, followed by dozens of other major financial cases, which were affirmed by the U.S. side and enhanced the substantive diplomacy and international financial security of both countries. In addition, in order to improve the investigation work, the TCIU held various seminars in Taiwan with U.S. professionals, and the trainees included prosecutors, police officers, military police, the investigators, Coast Guard Administration, and customs agents and bank personnel, which achieved remarkable results. In January 2008, the Director General of the U.S. Secret Service knowing the efforts and dedication of the TCIU, specially requested the MOJ to present a "plaque of appreciation" on behalf of the U.S. Secret Service to recognize and thank for the contributions of the relevant law enforcement officers.

(III) Preventing Human Trafficking and Safeguarding the National Image

Taiwan has attracted international attention because it has become a hub for the import and transit of sex and labor migrant from Southeast Asia. In May 2006, the U.S. Department of State, San Francisco Police Department, and U.S. department of Homeland Security investigated a case in which Taiwanese sexual workers were brought to the U.S. and discovered that over 150 women had obtained U.S. visas in a fraudulent manner and were actually engaged in

sexual transaction. In June 2007, the U.S. provided Taiwan with information and requested mutual legal assistance. The two sides cooperated in investigation and arrested ringleaders. The U.S. expressed their gratitude for our assistance in investigating this case.

Since human trafficking cases have a significant impact on the image of a country, in 2006, the MOJ, in conjunction with the Executive Yuan's "Action Plan for the Prevention of Human Trafficking," issued the "Specific Implementation Plan for the Prevention of Human Trafficking Cases". The THPO immediately established a Human Trafficking Prevention Supervision Unit (HTPSU) on January 1, 2007. The THPO held regular supervisory meetings, actively investigated human trafficking cases, assisted in the placement of victims, and had repeatedly supervised the prosecutors and police working jointly with U.S. law enforcement agencies to successfully crack down human trafficking syndicates. All these efforts and results have been repeatedly reflected in the U.S. Department of State's Annual Report on Trafficking in Persons. From 2010 to 2021, Taiwan has been ranked first Tier in the U.S. Department of State's global evaluation on trafficking in persons for 12 consecutive years.

（IV）Trade Secrets Cases, U.S. Requested for Assistance from Taiwan

Trade secrets are often related to advanced technology research and development or to the competition of industries. In cases of infringement of trade secrets, due to the cross-border circulation of information, or involvement of foreign manufacturers, the place of infringement, result or the evidence located abroad, etc., investigation and evidence collection is usually completed through mutual legal assistance.

In September 2017, the Taichung District Prosecutors Office indicted the Assistant Manager of United Microelectronics Corporation (UMC) and former senior executives of Micron Memory Taiwan Co., Ltd. (MMT) who took MMT's trade secrets to UMC for violations of the "Trade Secrets Act". In January 2018, the U.S. Department of Justice (US DOJ) investigated a theft of trade secrets case involving economic espionage and other crimes, in which the UMC, Fujian Jinhua Integrated Circuit Co. (JHICC) and former employees of MMT took the trade secrets from the U.S. company Micron Technology, Inc. The US DOJ requested mutual legal assistance with the MOJ to provide relevant evidence seized in the criminal investigations for reference and use in the U.S. cases. As the proceedings progressed, the US DOJ continued to submit a number of supplemental requests. When the case had been appealed to the Intellectual Property and Commercial Court after the ruling of the court of first instance, the Intellectual Property Branch, THPO (THPO-IPB), took over the prosecution duty and handled the requests for mutual legal assistance.

This mutual legal assistance case has been going on for many years and the evidence is voluminous and complicate. Every requested item was reviewed and considered by prosecutors as to whether to provide documents or not, and each item of evidence was duly authenticated, legally obtained with due process of law, and in proper format.

requested our assistance in interviewing witnesses in Taiwan for another trade secrets theft case. The MOJ referred the case to the THPO-IPB, for assistance, where prosecutor subpoenaed witnesses to give their testimony. With our consent, the U.S. prosecutor and FBI agents were able to participate in the depositions by audio-video link and raised additional questions which were then

completed by our prosecutor.[7]

（V）Establishing a contact window for Taiwan-U.S. law enforcement cooperation in intellectual property rights protection and combating digital infringement

In addition to the "TECRO-AIT Mutual Legal Assistance in Criminal Matters Agreement" signed between Taiwan and the United States in 2002, which provides a legal basis for mutual legal assistance, on February 22, 2017, Taiwan and the United States signed "Memorandum of Understanding between TECRO and AIT on IPR enforcement" to strengthen cooperation in combating intellectual property infringement and trade fraud. The THPO-IPB, was designated as the contact window, while the U.S. side designated the U.S. Department of Homeland Security's Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI) as counter windows. on April 16 of the same year, prior to signing the MOU, the ICE HIS Attaché in Hong Kong, accompanied by AIT staff, visited the THPO-IPB, to get to know each other and promote the cooperation. Afterward, the United States seized dozens of car water tank covers that had infringed the rights of many internationally renowned automobile manufacturers, and Taiwanese manufacturers were suspected of infringing patents, trademark rights, copyrights and false labels. On April 26, 2018, the ICE/HSI assistant counselor and the other US DOJ personnel, accompanied by the MOJ and AIT personnel, discussed with THPO-IPB on the anti-infringement and mutual legal assistance matters. In June 2019, the ICE/HSI Assistant Counselor again met with the prosecutors of THPO-IPB to hold talks to strengthen the ties and cooperation between Taiwan and U.S. law enforcement officials.

In 2018, THPO-IPB, the Intellectual Property Bureau of the Ministry of Economic

7. See Mutual Legal Assistance in Criminal Matters Act, Article 17, Section 2 and Section 3.

Affairs, the National Police Agency of the Ministry of the Interior, and the U.S. side jointly completed the "Implementation of the Taiwan-U.S. Digital Anti-Piracy Work Plan" to strengthen law enforcement cooperation in cases of digital infringement of intellectual property rights.

(VI) Assistance in Other Cases

According to the statistics in the years from 2004 to 2021 regarding the mutual legal assistance cases transferred by MOJ to THPO and those forwarded by THPO to district prosecutors offices for handling, there were 86 cases of assistance provided to the U.S., 303 cases of assistance provided to other countries, and 86 cases of assistance provided to the mainland China.[8]

IV. Cross-Strait Mutual Legal Assistance

On April 26, 2009, both sides of the Taiwan Strait signed the "Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement" ("Cross-Strait Mutual Legal Assistance Agreement"). This Agreement took effect on June 25 of the same year. Under the framework of the agreement, cooperation in the exchange of criminal information, investigation and evidence collection, and joint investigation may be carried out in an institutionalized and legalized manner to facilitate jointly combating various types of cross-border crimes. In recent years, fraud cases that were of particular concern to people on both sides of the Strait have been included as key targets of crackdown so as to safeguard the rights and interests of people on both sides of the Strait and ensure the public security. The following were projects and relevant actions handled by THPO:

8. Source: THPO Statistics Office.

(I) Guangxi-Nanning MLM Investment Fraud Project

The Guangxi Nanning MLM investment fraud cases have been prevalent in Nanning City, Guangxi Province, mainland China since 2010. They were serious money-sucking crimes committed by Taiwanese defrauding Taiwanese, in the name of "pure capital operation", in mainland China. The fraudulent syndicate used high bonuses as an incentive to recruit people across the Strait in the form of multi-level pyramid schemes. Due to the large amount of money involved, the vast areas affected, and the great impact on the public security, the THPO convened a coordination and liaison meeting with prosecutors, police, and investigators at the end of 2012, and established a task force in 2013. Through the platform of the "Cross-Strait Mutual Legal Assistance Agreement", THPO closely cooperated with the public security authorities in mainland China to exchange criminal information, investigate and collect evidence, and repatriate accomplices from mainland China. Subsequently, the Department of International and Cross-Strait Legal Affairs, MOJ and the Ministry of Public Security of the People's Republic of China arranged six cross-strait working meetings from December 2012 to 2015. During that period, the prosecutors of THPO led the district prosecutors in charge, and the investigators from Criminal Investigation Bureau, NPA, MOI to Nanning and Yibin Guangxi, to discuss the cases with the mainland public security officers, and then launched two simultaneous investigation actions across Taiwan. A total of 202 premises were searched, 32 financial fraud syndicates were detected, 206 defendants were arrested, and the number of victims was 710. In order to thoroughly eliminate the fraudulent syndicate in Nanning, Guangxi Province, the MOJ together with the THPO and the Bureau of Economic Crime Investigation of the Ministry of Public Security of mainland China, continued to hold working meetings and the district prosecutors offices also continued to conduct investigations to maintain the joint efforts of combating crimes across the Taiwan Strait. It is hoped that the people will be spared from being deceived and that the people's property will be secured.[9]

9. Quoted from the Exhibition documents on the Achievements for the Sixth Anniversary of the Cross-Strait Mutual Legal Assistance Agreement, hosted by Ministry of Justice in 2015. See also the Ministry of Justice press release of January 25, 2016, and the Report on the Seventh Anniversary of the Cross-Strait Mutual Legal Assistance Agreement on Joint Crime Fighting and Mutual Legal Assistance and its Implementation and Prospects of April 7, 2016.

(II) Supervision of Trans-Border Online and Telecommunication Fraud Case and Establish a Platform for Asset Recovery

The rampant number of cross-border telecom fraud cases involve criminal syndicates formed by people from both sides of the Taiwan Strait. It is common that the headquarters are located in Taiwan, while server rooms are all over the world, and the victims reside in mainland China. The defendants and places of crimes are also scattered in different jurisdictions of district prosecutors offices. The THPO is responsible for coordinating and supervising the investigation of such cross-border and cross-jurisdictional crimes.

On December 27, 2010, 14 nationals were arrested by the Philippine police and escorted to mainland China for their telecom fraud case, for which Taiwan lodged strong protests. After negotiating with the Ministry of Public Security and related authorities in mainland China, the MOJ assigned the head prosecutor and prosecutors of the Taoyuan District Prosecutors Office to go to mainland China to investigate and collect evidence. Both sides uphold the spirit of jointly combating crimes and agreed that we dispatched staff to bring the 14 telecommunication fraudsters back to Taiwan for investigation and trial under the framework of the "Cross-Strait Mutual Legal Assistance Agreement". This is the first case that Taiwan's prosecutors cooperated directly with the public security authorities in mainland China. In the meanwhile, the public security authorities also recognized the need for reciprocal cooperation with Taiwan's prosecutors.

In 2014, our nationals were caught in Kenya for telecom fraud case. After being acquitted by a local court in Kenya, 45 Taiwanese were sent to mainland China on April 8 and 12, 2016, without notifying the Taiwan side. On March 25, 2016, the Malaysian police together with Chinese police seized five telecom fraud facilities with information provided by the Chinese government, and arrested 120 suspects, 53 of whom were Taiwanese, and 32 of them were repatriated to mainland China on April 30.

In order to deal with the follow-up matters on the repatriation of Taiwan nationals to the mainland, the Executive Yuan instructed the Director General of Department of International and Cross-Strait Legal Affairs, MOJ, together with prosecutors and delegates of the Mainland Affairs Council, the Straits Exchange Foundation, and the Criminal Investigation Bureau to form a negotiation delegation for consultations. The two sides reached a consensus on "cooperation in investigation, arranging family visits, and discussing the principles of handling cross-border crimes in the future". Furthermore, in order to demonstrate our determination to combat cross-border telecom fraud, protect victims and achieve social justice, on April 28, 2016, the THPO invited the National Police Agency, MOI, the Investigation Bureau, MOJ, the National Communications Commission, the Banking Bureau, Financial Supervisory Commission, FSC, and the Ministry of Economic Affairs (MOEA), National Credit Card Center, and Financial Information Service Co. Ltd, along with the Taipei, New Taipei, Shihlin, Taoyuan, Taichung, Tainan and Kaohsiung District Prosecutors Offices to discuss the establishment of the "Platform of Asset Recovery for Trans-Border Telecom Fraud" to effectively intercept telecom fraud and recover the stolen asset, and to achieve the goal of "investigating deeply, seizing assets, and compensating victims".[10]

On December 21, 2021, the THPO set up the Cyber Crime Investigation Center. The Center will focus on those crimes of an implicit, intelligent and cross-border nature, and integrate investigation resources and kinetic energy, and develop anti-crime strategies as well. At the same time, THPO formulated a project of " Tracing and eradicating Cross-border Fraud Syndicate" to intensify the fight against telecommunication and internet fraud cases.[11]

V. Progress and Prospects

When there are no national borders for crimes, prosecution undergoes a geographical division of labor, so cross-border evidence collection, arrest and repatriation, and tracing the proceeds of crimes through mutual legal assistance are the key tasks. Although national prosecutorial

10. Press release of THPO on April 28, 2016.

11. THPO January 2022 e-newsletter.

systems and judicial procedures vary greatly, the goals of fighting and preventing crimes are shared in common. Taiwan is one of the members of international society and it is for sure that we cannot stay out of exchanges and cooperation with prosecutors and other law enforcement personnel in other countries. Hence, the following strategies and prospects are hereby proposed:

(I) Since Taiwan does not have formal diplomatic relations with most countries in the world, formal and regular cooperation are still limited. However, there is international recognition that mutual legal assistance in criminal matters should develop in a more flexible, adequate, and effective manner. For the essence of this reason, in addition to international organizations providing a platform for dialogue and cooperation, more efforts should be made to actively develop bilateral agreements and administrative collaborations between governments or agencies based on the principle of reciprocity and willingness to pragmatically cooperate, thereby contributing to the security and harmony of the international community.

(II) Since 2000, Taiwan has signed a number of extradition treaties or memoranda, civil and criminal mutual legal assistance agreements, and Transfer of Sentenced Persons Agreements with foreign countries. We have signed the "Cross-Strait Mutual Legal Assistance Agreement" with mainland China as well. In addition, we have been actively engaged in case assistance, ensuring prosecutors, courts, judicial police officers, and personnel dealing with diplomatic or mainland affairs can learn from a large number of cases and accumulate practical experience. Hence, it is advisable to strengthen the practical training for case undertakers about the professional knowledge of mutual legal assistance, as well as the communication and coordination among agencies involved and their appropriate divisions of labor. At the same time, after academia has more materials for research and discussion, it is advisable to deepen the systemic construction of the academic theory, so as to combine case experience, practical development and theoretical research to form a system and legal framework.

(III) In addition to mutual legal assistance treaties or agreements signed, the "Law of Extradition",the "Transfer of Sentenced Persons Act", and the "Mutual Legal Assistance in Criminal Matters Act", together with other legal provisions and executive orders related to mutual legal assistance, provide the sound basis for implementing mutual legal assistance in criminal matters. However, the "Law of Extradition"needs to be reviewed and amended in order to be more complete and harmonized in line with international principles and procedures.[12] The"Mutual Legal Assistance in Criminal Matters Act" should be further developed into detailed implementation guidelines, regulations governing confiscated property sharing and management, and other related administrative orders to enhance the density of regulations and facilitate external cooperation and domestic practice.[13]

(IV) Conducting professional exchanges or working meetings with foreign law enforcement partners helps prosecutors become acquainted with their partners, understand the differences in system, build trust and consensus, grasp international trends, and enhance the effectiveness of mutual legal assistance or joint law enforcement efforts.

12. The Ministry of Justice has proposed the "Draft Amendment to the Extradition Law" which was approved by the Executive Yuan on March 31, 2022, so that Taiwan's extradition legal system can keep pace with the trend the world. See the Ministry of Justice press release of March 31, 2022.

13. 12. Chen Wen-chi, "The Legal Basis of International Mutual Legal Assistance in Criminal Matters and its Legal Framework: A Review of Taiwan's Mutual Legal Assistance in Criminal Matters Act," in Taiwan Prosecutor Review, Vol. 25 (February 2019), pp. 153ff.

後花園 /2020/ 馨生人 Chen, Li-Wei


pexels-pok-rie-139975https /www.pexels.comzh-twphoto139975