

LEGAL FRAMEWORK AND PRACTICE OF MUTUAL LEGAL ASSISTANCE IN CHINA

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I. INTRODUCTION

After the mid-1990s, along with development of a market economy and an increase in foreign investment, China saw dramatic economic success. Meanwhile, economic prosperity led to more economic disputes, which in turn led to a quick increase in civil and commercial cases, including those involving foreign elements. According to the annual report of the Supreme People's Court (SPC) of the People's Republic of China (PRC) in 2002, people's courts at all levels handled less than 55,000 civil and maritime cases involving foreign elements in the five years from 1996 to 2001,¹ and the annual report in 2008 shows that the five years from 2002 to 2007 saw a considerable increase: the number reached 64,558, nearly a 15% increase.² After 2008, according to annual reports of the SPC, civil and maritime cases involving foreign elements handled by people's courts at all levels continued to increase; the total number was 19,621 in 2009,³ 20,258 in 2010⁴ and about 22,000 in 2011.⁵ In order to handle such cases, mutual legal assistance such as collecting evidence and sending legal documents abroad is naturally necessary.

Besides increases in civil and maritime cases involving foreign elements, China's efforts to crack down on corruption and terrorism in recent years makes mutual legal assistance more and more vital too. For example, according to a research report by a project team of the Chinese Academy of Social Sciences in June 2008, about 16,000 to 18,000 corrupt officials fled from China with more than 80 billion US dollars since the 1990s.⁶ Most of them are now in developed countries such as the US, Canada and EU countries, few of which have signed mutual judicial assistance treaties with China. In order to punish these corrupt officials, China has to request foreign authorities to help in locating and arresting suspects and recovering assets, etc. In sum, mutual legal assistance is unprecedentedly important and necessary to China now.

II. LEGAL FRAMEWORK OF MUTUAL LEGAL ASSISTANCE

China began to legislate on mutual judicial assistance since 1985, when China and

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¹ See Xiao Yang, Report of the Supreme People's Court on the 5th session of 9th National People's Congress (Mar.11, 2002).

² See Xiao Yang, Report of the Supreme People's Court on the 1st session of 11th National People's Congress (Mar.10, 2008).

³ See Wang Shengjun, Report of the Supreme People's Court on the 3rd session of 11th National People's Congress (Mar.11, 2010).

⁴ See Wang Shengjun, Report of the Supreme People's Court on the 4th session of 11th National People's Congress (Mar.10, 2011).

⁵ See Wang Shengjun, Report of the Supreme People's Court on the 5th session of 11th National People's Congress (Mar.11, 2012).

⁶ See Huashang Daily, 16th June, 2011.

France began to negotiate a mutual legal assistance treaty in civil and commercial matters. Since then, China has been actively participating in negotiating, drafting and ratifying international and bilateral documents.

According to the Ministry of Justice (MOJ) of the PRC, since ratification of the first international convention on mutual legal assistance in 1991, the Convention Concerning Sending Abroad Civilian or Commercial Judicial Documents and Un-judicial Documents, China has ratified 28 international and multilateral conventions on mutual legal assistance, including the UN Convention against Corruption and the UN Convention against Transnational Organized Crime. Since signature of the first Treaty on Mutual Judicial Assistance in Civil and Commercial Matters with France in 1987, China signed 107 bilateral mutual legal assistance treaties by the year of 2009.⁷ Meanwhile, China has laid down provisions on mutual legal assistance in general laws such as civil procedure laws and criminal procedure laws, and enacted special laws such as the Extradition Law.

75 of the 107 bilateral treaties that China has signed with foreign states have entered into force. Among them, 19 are in criminal matters, 19 in civil and criminal matters, 11 in civil and commercial matters, and 22 are extradition treaties. The remaining four are convict transfer treaties.⁸ It is worth noting that China has signed bilateral treaties on mutual legal assistance with less than half of the countries and regions in the world, the majority of which are developing countries, such as Central Asian countries. The barriers that China is confronted with mainly are the death penalty, problems in transparency of the justice system and differences in laws.

With the intention to facilitate mutual judicial assistance, China is striving to eliminate these barriers and create favorable conditions. For example, the 8th Amendment to the Criminal Law 1997 abolished the death penalty for 13 offences and in principle exempted the elderly beyond 75 from capital punishment. What is more important is that the Amendment showed the Chinese Legislature's resolution to abolish the death penalty for non-violent crimes and the fact that a majority of the people's representatives agreed on the abolition.⁹ Moreover, China is preparing to ratify the International Convention on Civil and Political Rights (ICCPR),¹⁰ which undoubtedly will make it necessary to amend related laws according to international standards and thereby reduce the gap between Chinese and foreign legislation.

Within the legal framework of mutual legal assistance in China, in addition to the general laws and special laws on mutual legal assistance, regulations and interpretation documents issued by related authorities such as the SPC are also worth mentioning here as they make decisions. For example, as early as in 1982, the SPC issued a notice on how to deal with issues concerning sending judicial documents between China and Japan. Another example would be the interpretation on how to deal with requests of foreign courts for sending judicial documents and submitting requests to foreign courts through the Ministry of Foreign Affairs jointly issued by the SPC, Ministry of Foreign Affairs and MOJ in 1986. Both are actually taking the place of law in guiding mutual judicial assistance in practice.

⁷ The Ministry of Justice of the PRC, Ratification of Treaties and Conventions on Mutual Judicial Assistance in China, at http://www.legalinfo.gov.cn/moj/sfxzws/content/2009-08/26/content_1144120.htm?node=7382.

⁸ Ibid.

⁹ See *Guangming Daily*, Aug. 26, 2010.

¹⁰ See *Nanfang Weekend*, Sep. 22, 2005.

In order to offer clear and uniform standards and application guidelines, The MOJ of the PRC had finished the draft of the Law on Mutual Judicial Assistance in Criminal Matters and submitted it to the legislature for review in 2009.¹¹ Meanwhile, Chinese scholars are making contributions too. For example, Professor Huang Feng at the College for Criminal Law Science of Beijing Normal University, a former high level official at the MOJ, published his expert proposal of Law on Mutual Judicial Assistance in Criminal Matters in March 2012.¹² Judging from the present reality, it is very likely that the Law will be adopted in the near future.

Briefly, China now conducts mutual legal assistance through three approaches. The first one is bilateral treaty. It might be the most reliable and fastest approach. However, it takes a long time to negotiate. The second one is multilateral/international conventions, such as the UNCAC and UNTOC. The last one is the foreign approach, which usually takes a long time and has to overcome more barriers, such as the possibility of being subject to the death sentence in criminal cases.

III. PROCEDURE

Procedures of mutual legal assistance in China vary with matters concerned. The most representative one might be the extradition procedure, in which the SPC, Supreme People's Procuratorate (SPP), Ministry of Public Security (MPS) and the State Council are all involved. Therefore, it has become an example often quoted to show how mutual legal assistance in criminal matters is handled in China.

According to the Extradition Law of the PRC enacted in 2000, upon receiving the request for extradition from the Requesting State, the Ministry of Foreign Affairs will examine whether the request and the accompanying documents conform to the extradition law and treaties. Where the Ministry of Foreign Affairs believes that the request conforms, it will transmit the request to the SPC and the SPP.

Where the person sought is detained for extradition before the request is made, the SPC will transmit the request to the Higher People's Court concerned for examination. Where the said person is not detained, the SPC shall, after receiving the request, notify the MPS to search for the person.

The Higher People's Court designated by the SPC will examine whether the request satisfies conditions for extradition and render a decision on it. The SPC will review the decision, and decide whether the extradition shall be granted.

After receiving the decision made by the SPC that no extradition shall be granted, the Ministry of Foreign Affairs shall, without delay, notify the Requesting State of the same. Upon receiving the decision made by the SPC that the request meets the conditions for extradition, the Ministry of Foreign Affairs shall submit the decision to the State Council for which to decide whether to grant extradition.

Where the State Council decides not to grant extradition, the Ministry of Foreign Affairs shall, without delay, notify the Requesting State of the same. The People's Court shall immediately notify the public security organ to terminate the compulsory measures against

¹¹ See Legal Daily, Mar. 4, 2009.

¹² See Huang Feng (2012) Legislative Proposal of Law on Mutual Judicial Assistance in Criminal Matters and Its Proofs, Beijing: Peking University Press.

the person sought.

As for legal assistance in civil and commercial matters, procedures are relatively easy and fast.

IV. PRACTICE OF MUTUAL LEGAL ASSISTANCE

China has seen a number of well known cases of mutual legal assistance in recent years. For example, LAI Changxing, a notorious smuggling ring kingpin, formed a smuggling ring with bases in Hong Kong and Xiamen since 1991, importing cigarettes, cars and other commodities worth 27.395 billion Yuan (US \$3.69 billion) and evaded duties of nearly 14 billion Yuan from December 1995 to May 1999.¹³ He then fled from China and stayed in Canada for more than 10 years. After long, laborious negotiation, he was transferred to China in July 2011 and sentenced to life imprisonment in May 2012.¹⁴

Another example would be cooperation between China and Thailand. China and Thailand have signed a Bilateral Mutual Judicial Assistance Treaty in Criminal Matters, Extradition Treaty and Convict Transfer Agreement. According to the Ministry of Public Security of the PRC, China has transferred 56 telecom-fraud suspects to Thailand since September 2008 in recent years; the last time was in November 2012, 6 criminal suspects were arrested by the Chinese public security authority and transferred to the Thailand police authority.¹⁵

According to the MOJ, China only dealt with less than 100 cases of mutual legal assistance annually in the 1980s and 1990s. However, the annual number quickly increased to more than 1,500 in the beginning of 21st century. For example, the MOJ handled more than 3,000 cases in 2008. It is especially worth noting that convict transfer cases are on the increase in recent years. The MOJ had received 198 convict transfer requests from both Chinese and foreign authorities by 2012. The MOJ handled 251 cases of mutual judicial assistance in criminal matters, which is a nearly 50% increase compared to previous years, and submitted 8 requests for mutual judicial assistance in criminal matters in 2011.¹⁶

V. CONCLUSION

For China, there are still barriers in the way of extending mutual legal assistance. However, as noted above, China is making efforts to promote mutual legal assistance with foreign countries by adapting domestic laws, ratifying international documents, etc. Meanwhile, international terrorism, environmental crimes and corruption issues make mutual legal assistance vital for all members of this small global village. Therefore, mutual legal assistance will and should be promoted as effectively and as soon as possible.

¹³ See People's Daily (overseas edition), July 26, 2011.

¹⁴ See Procuratorial Daily, May 19, 2012.

¹⁵ See Yangzi Evening, Nov.16, 2012.

¹⁶ See Legal Daily, Feb. 12, 2012.