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China Enacted “Blocking Statute” for International Criminal Judicial Assistance

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On October 26, 2018, the People’s Republic of China (the “PRC”) enacted the International Criminal Judicial Assistance Law (the “ICJAL”), which immediately came into effect. In essence, the ICJAL serves as a blocking statute¹ that requires approval by PRC governmental authorities before any institution, organization, or individual within the territory of the PRC can provide evidence materials and assistance to any foreign countries’ criminal proceedings.² As such, the ICJAL could significantly impact cross-border criminal enforcement and prosecutions, which are increasingly commonplace as the world becomes further globalized.

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Enactment of the ICJAL may be a defensive maneuver by the PRC in response to extraterritorial enforcement reach of other countries. The context is particularly salient when viewed in light of the U.S. Department of Justice’s (the “DOJ”) recent enforcement focus on China. With respect to the U.S. and the PRC, the ICJAL also represents a significant update since the two countries signed in June 2000 a Mutual Legal Assistance in Criminal Matters Treaty (the “China-U.S. MLAT”).³ While the ICJAL is new and its actual enforcement and interpretation is yet unclear, it stands to significantly impact multinational companies (“MNCs”) doing business in China when facing potential criminal enforcement—in particular, it could potentially further complicate disclosures to criminal enforcement agencies outside China.

Key Provisions of the ICJAL

The ICJAL’s provisions govern both where the PRC requests criminal assistance from other countries and where other countries request criminal judicial assistance from the PRC. In both situations, the requesting agency has to undergo procedures specified by the ICJAL and obtain approval by competent Chinese authorities. However, the situation where a foreign agency is making the request may be more pertinent to multinational corporations doing business in China.

The ICJAL’s chapters comprehensively cover service of documents; investigation and evidence collection; witnesses’ testimony; seizing, detaining, and freezing properties; confiscation and return of illicit gains; and transferring sentenced individuals. Two particular types of assistance—evidence collection and access to witnesses—are particularly noteworthy for MNCs’ doing business in China. In both cases, a requesting foreign country must submit written request and various accompanying materials to PRC governmental authorities for review before such information can be provided to the foreign country.⁴ The ICJAL also affords the PRC authorities significant discretion to reject the

¹ We note that here, China joins several other countries to enact laws that serve to “block” transfer of information to foreign government entities, such as Switzerland and France. In Switzerland, disclosures of data may implicate laws intended to protect personal privacy, banking-customer confidentiality, business-competitive information, and state sovereignty. Similarly, France’s blocking statute (French law 68–678 of 26 July 1968) prohibits any communication of economic, commercial, industrial, financial, or technical documents or information to be used as evidence in legal proceedings outside of France, subject to mechanisms afforded under international agreements or treaties.

² According to Article 6 of the ICJAL, “Competent Authorities” for conducting international criminal judicial assistance are the State Supervision Commission, the Supreme People’s Court, the Supreme People’s Procuratorate, the Ministry of Public Security, the Ministry of National Security, and other departments.

³ See <https://www.state.gov/documents/organization/126977.pdf>.

⁴ Information that needs to be provided for evidence collection assistance includes (1) The name, gender, address, identity information, contact information of the respondent and other information that helps confirm the respondent; (2) Questions that need to be asked by the respondent; (3) The name, gender, address, identity information, contact information, appearance and behavioral

assistance request—including where the request is “clearly harmful to the sovereignty, security, or social public interest” of the PRC.⁵ Even if granted, the PRC authorities have the power to monitor and intervene in the foreign country’s evidence gathering or testimonial process in China—for example, the competent authorities *shall* send personnel to accompany a witness testimony proceeding being conducted via video or audio, and the personnel *shall* cease any circumstances that damage the sovereignty, security and social public interests of the PRC.⁶

The ICJAL is also silent on several key questions. For example, it does not state the length of the review period, the key factors for assessing requests, and, most importantly, the consequences for failure to comply with the ICJAL’s requirements. Because the ICJAL is only recently enacted and effective, relevant PRC authorities might promulgate further guidance and measures to fill in these gaps. Until then, however, these uncertainties could leave great latitude to the PRC authorities in implementing the ICJAL.

What Scenarios Does the ICJAL Cover?

The ICJAL clearly states that it applies to “criminal” proceedings. Hence, investigations, subpoenas, interviews, enforcement actions carried out by a foreign “criminal” enforcement agency upon PRC persons or within the PRC’s territories would be covered by the ICJAL.

At the same time, however, the PRC authorities could potentially make its own determination on whether a foreign country’s proceeding is “criminal.” As with the other factors noted above, there is no clear guidance on how PRC authorities will do so. They could potentially consider, for example, the nature of the foreign requesting body, its enforcement powers, and the conduct in question. Such an analysis could become complex where the requesting body’s enforcement powers can be both civil and criminal, the conduct can result in civil and criminal penalties, or the proceedings are undertaken as part of a criminal process, but not by a criminal enforcement agency itself (*e.g.*, requests by a monitor approved by the DOJ in the context of a deferred prosecution agreement).

Additionally, the language of the ICJAL could be interpreted to apply to criminal procedures *not* initiated by a foreign government agency. The ICJAL provides that “...no institution, organization or individual within the territory of the People’s Republic of China shall provide any evidentiary material or assistance set forth hereunder to a foreign country.” The language appears to specifically forbid private parties (*e.g.*, MNCs) from transmitting information internationally without obtaining approval from the PRC authorities, placing the obligation on the private party rather than the foreign government. This could mean that ICJAL approval requirements are required before an MNC can voluntarily disclose evidence of potential criminal conduct from its China operations to a foreign criminal enforcement body, and potentially “blocking” the MNC from making a full and complete voluntary disclosure of all relevant facts. In jurisdictions such as the U.S., this can seriously impact the MNC’s ability to securing a favorable resolution with the DOJ.

characteristics of the persons to be searched for or identified, and other materials that are helpful for finding and identifying such person; (4) Specific information such as the ownership, location, characteristics, appearance and quantity of the property in question to be inquired and verified, and relevant information of the financial account to be inquired and verified; (5) Specific information on the holders, locations, characteristics, appearance and quantities of documents, records, electronic data and articles that need to be obtained; (6) Specific information of the object to be identified; (7) Specific information on places, items, etc., that need to be inspected or examined; (8) Specific information of the object to be searched; and (9) Other materials that are helpful to execute the request. *See* Article 26. Information that needs to be provided for witness assistance includes (1) The name, gender, address, identity information, contact information and other materials that help to identify the witnesses and experts; (2) The purpose, necessity, time and place of the testimony or assistance in the investigation; (3) The rights and obligations of witnesses and experts; (4) Protection measures for witnesses and experts; (5) Subsidies to witnesses and experts; and (6) Other materials that contribute to the execution of the request; and the foreign country is required to submit a “written undertaking” (*Shumian Baozheng*). *See* Article 32.

⁵ *See* Articles 14–15.

⁶ *See* Article 37.

Procedures to Secure Approval: Revival of the MLAT?

The ICJAL provides general procedures for approval requests for criminal assistance. However, it also defers to applicable mutual legal assistance treaties (“MLATs”), so long as it does not violate basic principals of PRC laws.⁷ Taking the China-U.S. MLAT as an example, the Ministry of Justice would be the PRC central authority and the Attorney General (or a person designated by the Attorney General) as the U.S. central authority for making and receiving assistance requests. The China-U.S. MLAT stipulates various information to be provided in making a request, including (1) the name of the competent authority conducting the investigation, prosecution, or proceeding to which the request relates; (2) a description of the subject matter and nature of the investigation, prosecution, or proceeding, including a summary of relevant facts, the relevant provisions of laws, the specific criminal offenses that relate to the matter and any punishment that might be imposed for each offense; (3) the purpose and relevance for which the evidence, information, or other assistance is sought; (4) the time limit within which compliance with the request is desired; and (5) a description of the evidence, information, or other assistance sought. To the extent necessary, a criminal request shall also include detailed information such as a list of questions to be asked of a witness, and information on the name, sex, nationality of a witness from whom evidence is sought. The China-U.S. MLAT specifies that a request shall be confirmed in writing within fifteen days absent alternative arrangement, but does not provide any timing requirements regarding how long the receiving party should process and execute the request.

Irrespective of the China-U.S. MLAT’s additional procedural provisions, the MLAT has been invoked only infrequently in the past. According to an interview with a Chinese Ministry of Justice official in 2010, from 2004 to 2010, there were 59 criminal assistance requests exchanged between the PRC and the U.S., and, due to the complexities of these cross-border enforcement efforts, only a small number of cases were resolved and closed.⁸ The process specified in the China-U.S. MLAT is also time-consuming and cumbersome, taking ten months to complete on average.⁹

Furthermore, the outlook for cooperative spirit between the U.S. and China also does not appear rosy. In December 2018, the SEC and Public Companies Accounting Oversight Board (PCAOB) released a joint statement that they have not been able to resolve obstacles in accessing books and records of Chinese companies and the work papers of Chinese auditors.¹⁰ The statement cited Chinese state secret and national security laws as blocking access.¹¹ The issue dates back a decade, centering on a series of accounting scandals centering around Chinese companies that listed (and later delisted) on U.S. exchanges via “reverse mergers.” The years of talks between the SEC and PCAOB with Chinese regulators since then apparently have been unfruitful. Furthermore, these statements are made in the wake of the former-Attorney General Jeff Session’s “China Initiative”¹² and a host of other DOJ enforcement and legal actions targeting Chinese companies. These statements and policy positions tend to signal adversarial tension, rather than shift towards a cooperative tone. Thus, whether mutual cooperation based on the China-U.S. MLAT will see a new role in response to the ICJAL’s impact remains an open question.

⁷ See Article 3.

⁸ See <http://news.sohu.com/20101209/n278190737.shtml>.

⁹ See Eleanor Ross, *Increasing United States–China Cooperation on Anti-Corruption: Reforming Mutual Legal Assistance*, 86 GEO. WASH. L. REV. 839, 850–51 (2018).

¹⁰ See <https://www.sec.gov/news/public-statement/statement-vital-role-audit-quality-and-regulatory-access-audit-and-other>; see also <https://www.wsj.com/articles/sec-revives-fight-over-inability-to-inspect-chinese-auditors-of-alibaba-baidu-1544229843>.

¹¹ *Id.*

¹² See <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-announces-new-initiative-combat-chinese-economic-espionage>; <https://www.justice.gov/opa/speech/file/1107256/download>.

U.S. Reform in Parallel: DOJ Cooperation Credit Policy Changes

Recent years have witnessed a great surge in the number of DOJ enforcement actions related to China. In particular, the DOJ's 2017 Corporate Enforcement Policy¹³ regarding the Foreign Corrupt Practices Act ("FCPA") makes it clear that it expects full cooperation from companies under investigation, which is critical to securing cooperation credit and possibilities of a deferred prosecution or declination.

The DOJ's expectations and policies have generated concerns among multinational companies that are caught between the DOJ's expectations and local law requirements. The PRC's ICJAL (along with preexisting state secrets and personal data privacy laws) could significantly limit an MNC's ability to make witnesses available to the DOJ for interviews and to produce information, particularly culpable evidence that touches on a PRC national's personal information or communications. While the exact impact of the ICJAL on the DOJ's expectation has yet to be tested, the DOJ has signaled an empathetic tone in its recent policy announcements. On November 29, 2018, the Deputy Attorney General Rod J. Rosenstein delivered remarks at a conference announcing changes of the DOJ's policy.¹⁴ The revised policy makes clear that "any company seeking cooperation credit in criminal cases must identify every individual who was substantially involved in or responsible for the criminal conduct." Previously, the DOJ required companies to disclose "all relevant facts" for "every person involved." Following the announcement, the Justice Manual (previously known as the U.S. Attorneys' Manual) has been amended to acknowledge that there may be circumstances where a company "genuinely cannot get access to certain evidence or is legally prohibited from disclosing it to the government." Under these circumstances, the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor.

Apart from the DOJ's perspective, the ICJAL also raises strategic questions from a local law enforcement perspective—in particular, whether seeking approval will amount to parallel self-reporting of criminal conduct to the Chinese government. The required information to file a request under the China-U.S. MLAT includes details regarding the nature of the conduct and a summary of relevant facts, and the underlying conduct would likely have occurred within the PRC's territory and jurisdiction. Hence, the request itself could potentially elicit inquiries by PRC enforcement agencies. However, the voluntary disclosure framework within the PRC is dissimilar to those in other jurisdictions, such as the U.S. Balancing these issues will likely add to the complexity, risks and costs for an MNC when dealing with a potential self-disclosure situation.

What Can MNCs Do in Response to the ICJAL?

- **Continue to monitor new ICJAL guidance and implementing rules, and foreign criminal enforcement and settlement cases involving China.** The ICJAL was only recently enacted, and additional guidance and implementing rules could be promulgated to answer some of the questions raised in this article. At the same time, new enforcement cases could signal the approach taken by both the PRC authorities and foreign criminal agencies, including how the DOJ will interpret the ICJAL's impact on cooperation credit, going forward.
- **Consider the ICJAL requirements early in the process.** If an MNC is facing potential criminal proceedings or considering voluntary disclosure to foreign enforcement agencies, it will be important to consider the ICJAL's requirements early in the process. The MNC may need to (possibly with guidance from appropriate counsel) liaise with relevant PRC authorities and understand the applicability of the ICJAL and how the PRC authorities will undertake the necessary procedures. This will also help the MNC to manage time expectation of the PRC authorities. Those considerations will need to be factored into the disclosure and cooperation process.

¹³ The DOJ's FCPA Corporate Enforcement Policy is available at <https://www.justice.gov/criminal-fraud/file/838416/download>.

¹⁴ The speech is available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>.

- **Manage communications between the foreign and the PRC authorities.** A notable challenge for MNCs will be to avoid having to make a choice of being deemed uncooperative by a foreign regulator or risking violating the ICJAL's requirements—the proverbial “between a rock and a hard place.” Hence, it is important for the MNC to timely and effectively communicate the issues to the respective regulators and authorities, and appropriately manage communications among those regulators and authorities.
- **Consider potential PRC enforcement impact.** The MNCs would need to weigh the potential outgrowth of PRC enforcement risks from the request and approval process at related PRC authorities. An effective strategy on responding to such potential enforcement will avoid the MNC having to face parallel enforcement cases unprepared.

The ICJAL presents new challenges for MNCs doing business in China. Balancing the expectations of foreign enforcement regimes with PRC legal requirements will be key to successfully navigating a complex cross-border enforcement scenario.