

# CHINA LEGAL REPORT\*

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## **Subject: Amended State Compensation Law**

On April 29, 2010, the *Decision of the Standing Committee of the National People's Congress on Amending the State Compensation Law of the People's Republic of China*, was adopted at the 14th Session of the Standing Committee of the 11th National People's Congress of the People's Republic of China, and shall come into effect on December 1, 2010.

### **I. Background of Legislation**

The legislation purpose of the State Compensation Law is to provide a legal mechanism, which grants citizens, legal persons and other organizations with the right of a compensation by the state in the event that any state organ or state functionary, while performing its/his functions, commits any infringement upon the legitimate rights and interests of them and hence caused any damage thereupon.

The stipulations of the original State Compensation Law, which was promulgated in 1994, especially with regard to the compensation-related procedures, proved to be too general and even problematic on certain specific issues. Therefore, in order to better safeguard the rights of citizens, legal persons and other organizations to legally obtain state compensation according to law, and to better promote the exercise of the functions and powers of state organs according to law, the amended State Compensation Law has been promulgated.

Below, we will set forth the main content of the amended State Compensation Law, especially with regard to the administrative compensation.

### **II. Main Content of the Amended State Compensation Law**

The Amended State Compensation Law basically provides two types of compensation, namely, administrative compensation, and criminal compensation. The former refers to the compensation in case that an administrative organ or its functionaries, in exercising their administrative functions and powers, commit the acts infringing upon personal rights or property rights of citizens, legal persons and other organizations; while the latter refers to the compensation in case that an organ performing the criminal investigation, prosecution or trial functions, a detention center or prison administrative organ or any of its functionaries, in performing its/his functions and powers, commits the infringements upon the personal rights or property rights of citizens, legal persons and other organizations.

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<sup>1</sup> Defined hereinafter, compared with criminal compensation, the other type of compensation as provided for in the State Compensation Law.

<sup>1</sup> The State Compensation Law also stipulates that, in the event that a people's court, in violation of the law, adopts in civil or administrative proceedings compulsory measures or preservative measures in impairment of the proceedings, or wrongly enforces a judgment or a ruling or other effective legal documents, thereby resulting in damage being done, the criminal compensation procedures of this Law shall be applicable to the procedure for making claims for compensation by the claimant.

## 1) Claimant of Compensation

As stipulated in the State Compensation Law, victimized citizens, legal persons or other organizations shall have the right to demand compensation. Further, in case of death of a victim, his heirs or other relatives in maintenance relationship with the deceased shall have the right to demand compensation; in case of termination of a victimized legal person or other organization, the legal person or other organization that succeeds to the former's rights shall have the right to claim compensation.

We understand from the above stipulations that the foreign-invested enterprises, as one of the different types of domestic enterprises, shall fall in to the scope of "legal persons or other organizations" as well, and hence shall be entitled to claim for state compensation according to the State Compensation Law.

Further, as for the foreign companies or foreigners, the State Compensation Law also clearly stipulates that, in case that a foreigner, a foreign enterprise, or a foreign organization within the territory of the People's Republic of China demands compensation to be made by the People's Republic of China, this State Compensation Law shall apply; in case that a country to which a foreigner, a foreign enterprise, or a foreign organization belongs gives no protection to or limits the right of a citizen, a legal person, or other organizations of the People's Republic of China to claim compensation by that country, the People's Republic of China shall implement the principle of reciprocity with the country to which the foreigner, the foreign enterprise, or the foreign organization belongs

## 2) Administrative Compensation<sup>4</sup>

### A. Scope of Compensation

The victim shall have the right to compensation if an administrative organ or its functionaries, in exercising their functions and powers, commit any of the following acts infringing upon **property right**:

- (1) Illegally inflicting administrative sanctions, such as imposition of fines, revocation of certificates and licenses, ordering suspension of production and business, or confiscation of property;
- (2) illegal implementation of compulsory administrative measures, such as sealing up, distaining or freezing property;
- (3) illegal expropriation or requisition of property; or
- (4) Other illegal acts, which cause damage to property.

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<sup>3</sup> In contrast to a foreign enterprise resided in or established in foreign countries.

<sup>4</sup> Considering that, as for the foreign companies and foreign-invested companies in China, the administrative compensation generally should be more likely to be concerned, we therefore more focus on and set forth in detail the administrative compensation hereinafter, in comparison with the criminal compensation.

The victim shall have the right to compensation if an administrative organ or its functionaries, in exercising their administrative functions and powers, commit any of the following acts infringing upon the **personal rights** of a citizen:

- (1) Detaining a citizen in violation of the law or unlawfully taking compulsory administrative measures in restraint of his personal freedom;
- (2) Unlawfully taking a citizen into custody or depriving him of his personal rights by other unlawful means;
- (3) causing bodily injury or death to a citizen by battery, maltreatment, etc. or by instigating or conniving at battery, maltreatment, etc. by another person;
- (4) Unlawfully using weapons or police restraint implements, thereby causing bodily injury or death to a citizen; or
- (5) Other unlawful acts causing bodily injury or death to a citizen.

The State shall not be liable for compensation in any of the following circumstances:

- (1) Individual acts of a functionary of an administrative organ, which have nothing to do with the exercise of his functions and powers;
- (2) Damage arisen from acts done by citizens, legal persons or other organizations themselves; or
- (3) Other circumstances provided by law.

## **B. Organs Liable For Compensation**

Where an administrative organ and its functionaries, in exercising their administrative powers, infringe upon the lawful rights and interests of a citizen, a legal person or other organizations, thereby causing damage to them, the administrative organ shall be the organ liable for compensation.

In case of administrative reconsideration, the administrative organ that first did the tortious act shall be the organ liable for compensation; however, if the outcome of the reconsideration aggravates the damage, the organ undertaking the reconsideration of the case shall carry out its compensatory obligations in regard to the increased portion of damages.

## **C. Compensation Procedures and Time Limit**

### **a) Application**

A claimant who demands compensation shall first apply to the organ liable for the compensation, or may make demands for it simultaneously when applying for administrative reconsideration of the case or when bringing an administrative action.

## **b) Decision Making**

An organ obligated to make compensation shall, **within two months upon receipt of an application**, make a decision on whether to make compensation. When deciding whether to make compensation, the organ obligated to make compensation shall fully hear the opinion of the compensation claimant, and **may**, in accordance with this Law, **consult with the compensation claimant about the manner, items and amount of compensation.**

If the organ obligated to make compensation decides to make compensation, it shall prepare a written decision on compensation, and serve it to the compensation claimant **within 10 days from the day on which the decision is made;** If the organ obligated to make compensation decides not to make compensation, it shall notify the compensation claimant in writing of the decision within 10 days from the day on which the decision is made as well as the reasons for making the decision.

## **c) Lawsuit**

Where an organ obligated to make compensation fails to make a decision on whether to make compensation within the prescribed time limit, the compensation claimant may, **within three months upon the expiration of the time limit, bring a lawsuit in the people's court.**

Where the compensation claimant raises any objection to the manner, items or amount of compensation or if the organ obligated to make compensation decides not to make compensation, the compensation claimant may, **within three months from the day on which the organ obligated to make compensation decides to make compensation or not to make compensation, bring a lawsuit in the people's court.**

## **D. Others**

When a people's court hears a case of administrative compensation, the compensation claimant and the organ obligated to make compensation shall provide evidence on their respective claims.

If, during the period when the organ obligated to make compensation implements administrative detention or any other compulsory measure restricting personal freedom, the person whose personal freedom is restricted dies or loses his civil conduct capacity, the organ obligated to make compensation shall provide evidence on whether there is a causation between its action and the death or loss of civil conduct capacity of the person whose personal freedom is restricted.

The organ liable for compensation shall, after making the compensation, charge its

functionaries, entrusted organizations or individuals who have been intentional or grossly negligent in the matter, to bear part or the whole of the compensatory expenses. The relevant organ shall take a disciplinary action against a liable person with intent or gross negligence in accordance with law; and if a crime is constituted, shall bring the offender to justice according to law.

### **3. Criminal Compensation**

#### **A. Scope of Compensation**

Where an organ performing a criminal investigation, prosecution or trial functions, a detention center or prison administrative organ or any of its functionaries commits any of the following infringements upon the **personal rights** in performing its/his functions, the victim shall be entitled to compensation: (1) the measure of detention is taken against a citizen in violation of the Criminal Procedure Law, or although the measure of detention is taken in accordance with the conditions and procedures as prescribed in the Criminal Procedure Law, the period of detention has exceeded the time limit as prescribed in the Criminal Procedure Law and a decision to withdraw the case or not to prosecute or a judgment of acquittal is made later to terminate the criminal procedure; (2) after the measure of arrest is taken against a citizen, a decision to withdraw the case or not to prosecute or a judgment of acquittal is made to terminate the criminal procedure; (3) a judgment of acquittal is made in a retrial held under the trial supervision procedure, but the original sentence has already been served; (4) a bodily injury or death is caused to a citizen by extorting a confession by torture, by battery or maltreatment or by instigating or conniving at battery or maltreatment by another person; or (5) a bodily injury or death is caused to a citizen by the illegal use of a weapon or police instrument.

Where an organ performing the criminal investigation, prosecution or trial functions, a detention center or prison administrative organ or any of its functionaries commits any of the following infringements upon the **property rights** in performing its/his functions, the victim shall be entitled to compensation: (1) the measure of sealing up, seizure, freezing, recovery, etc. is illegally taken against property; or (2) a judgment of acquittal is made in a retrial held under the trial supervision procedure, but the fine or confiscation of property determined in the original sentence has already been executed.

#### **B. Compensation Procedures**

##### **a) Application**

To claim compensation, the compensation claimant shall firstly apply to the organ obligated to make compensation.

The organ obligated to make compensation shall, within two months upon receipt of an application, make a decision on whether to make compensation.

## **b) Reconsideration**

Where an organ obligated to make compensation fails to make a decision on whether to make compensation within the prescribed time limit, the compensation claimant may, within thirty days upon the expiration of the time limit, apply for reconsideration to the organ at the next higher level above the organ obligated to make compensation.

Where the compensation claimant raises any objection to the manner, items or amount of the compensation or the organ obligated to make compensation decides not to make compensation, the compensation claimant may, within thirty days from the day on which the organ obligated to make compensation decides to make compensation or not to make compensation, apply for reconsideration to the organ at the next higher level above the organ obligated to make compensation. Where the organ obligated to make compensation is a people's court, the compensation claimant may apply for a compensation decision to the compensation committee of the people's court at the next higher level.

The aforesaid organ undertaking the reconsideration shall make the decision within two months from the date of receiving the application.

## **c) Application to Compensation Committee of the People's Court**

If a compensation claimant refuses to accept the reconsideration decision, he may, within thirty days upon receipt of the reconsideration decision, apply for a compensation decision to the compensation committee of the people's court at the same level at the place where the reconsideration organ is located; If the reconsideration organ fails to make a decision within the prescribed time limit, the compensation claimant may, within thirty days upon the expiration of the time limit, apply for a compensation decision to the compensation committee of the people's court at the same level at the place where the reconsideration organ is located.

The compensation committee of a people's court shall make a decision within three months upon receipt of an application for compensation. If the case is a difficult, complicated or important one, the time limit may be extended for three months upon approval of the president of the court.

Decisions made by a compensation commission are legally effective, and must be implemented.

## **d) Appeal:**

Where a compensation claimant or an organ obligated to make compensation considers that the decision of a compensation committee is wrong for sure, it may appeal to the compensation committee of the people's court at the next higher level.

## 4. Forms and Assessment of Compensation

### A. As for Property Right

Infringement of **property right** of a citizen, a legal person, or other organizations, resulting in damage being caused, shall be dealt with in accordance with the following provisions:

- (1) If a fine or recovery or confiscation of property has been imposed or any property has been illegally expropriated or requisitioned, such property shall be returned;
- (2) If properties have been sealed up, distrained or frozen, the restraints shall be lifted; for properties thus damaged or missing, compensation shall be paid in accordance with the provisions of Items 3 and 4 of this Article;
- (3) If the property to be returned is damaged, it shall be restored to its original condition if such restoration can be done; if not, corresponding compensation shall be paid in accordance with the extent of the damage;
- (4) If the property to be returned is missing, corresponding compensation shall be paid;
- (5) If any property has been auctioned or otherwise sold, the income from the auction or sale shall be paid to the victim. If the income from the sale is obviously lower than the value of the property, a corresponding compensation shall be paid;
- (6) If a certificate or license has been revoked and a suspension of production and business has been ordered, compensation shall be paid for necessary overhead expenses for the period of such suspension;
- (7) If a paid fine or recovered or confiscated money is refunded or a freeze on a deposit or a remittance is lifted, interest calculated at the bank deposit rate over the same period shall be paid; and
- (8) If other damage is done to property rights, compensation shall be paid for the direct losses.

### B. As for Personal Right

If the personal **freedom** of a citizen is infringed, compensatory payment for each day shall be assessed in accordance with the State average daily pay of staff and workers in the previous year.

If a citizen's **right to life and health** is infringed upon, compensatory payment shall be assessed in accordance with the following provisions:

- (1) for any bodily injury, medical treatment expenses, nursing fees and compensation for lost wages shall be paid. The daily compensation for lost wages shall be calculated according to the state average daily wages of workers in the previous year, and the maximum amount shall be five times the state average yearly wages of workers in the previous year;
- (2) For the partial or total loss of working capability, medical treatment expenses, nursing fees, costs of disability assistance equipment, expenses for rehabilitation, other necessary expenditures due to disability and necessary expenses for continuing treatment, and



disability compensation shall be paid. The disability compensation shall be determined in light of the degree of loss of working capability and in line with the disability grade set out by the state, and the maximum amount shall not exceed twenty times the state average yearly wages of workers in the previous year. For the total loss of working capability, living expenses for the victim's dependents without working capability shall also be paid; or

(3) If death results, compensation for death and funeral expenses shall be paid, the total amount shall be twenty times the State average yearly pay of staff and workers in the previous year. Living expenses shall be paid to those who have no working capability and have been supported by the deceased in his lifetime.

Where any infringement on personal rights as mentioned in this Law inflicts any **mental distress** on the victim, the infringing organ shall, within the extent of effects of the infringement, eliminate the effects of infringement for the victim, restore the victim's reputation and make an apology. If serious subsequences are caused, the infringing organ shall pay a proper amount of consolation money for the mental distress.

## 5) Others

The time limitation for a compensation claimant to request state compensation shall be **two years**, which shall be computed from the day on which the compensation claimant knows or should have known that the action taken by a state organ or any of its functionaries in performing its/his functions has infringed upon the personal or property right of the compensation claimant, excluding the period of restriction of personal freedom such as custody. Where a compensation claimant files a claim for compensation along with other claims when applying for administrative reconsideration or bringing an administrative lawsuit, the provisions on time limitation of the Administrative Reconsideration Law or the Administrative Litigation Law shall apply.

The limitation of action for claims for State compensation shall be suspended if during its last six months, the claimant is unable to exercise his rights due to force majeure or other obstacles. The limitation shall resume from the day the grounds for suspension are eliminated.

## III. Conclusion

As for the foreign companies or individuals and their foreign-invested companies in China, this State Compensation Law entitles them to claim for and legally obtain a compensation from the state in the event that any related governmental organ has illegally infringed their legitimate rights and interests and hence caused any damage on them, for instance but not limited to, the administrative authorities, especially in some local areas where regional protectionism prevails, have imposed the administrative penalties against them in violation of the laws.

We are optimistically looking forward to the outcome of the enforcement of this amended State Compensation Law, and we hope that this amended State Compensation Law will improve the exercise of the functions and powers of the Chinese governmental bodies and their functionaries, so as to promote foreign investment in China.

PUBLICATION.