

NOTE

Increasing United States–China Cooperation on Anti-Corruption: Reforming Mutual Legal Assistance

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ABSTRACT

In 2012, President Xi Jinping announced a new anti-corruption policy for the People's Republic of China ("China"). This policy included sending Chinese officials to recover economic fugitives who fled to foreign countries that did not have extradition treaties with China. One such country is the United States, which has frequently refused to provide assistance to China on criminal matters. Sending these officials violates the United States' sovereignty and ignores the legitimate concerns the United States has about the Chinese legal system. The United States and China should enter into a new, bilateral treaty for the provision of mutual legal assistance in criminal matters. This treaty should specifically cover economic crimes, provide for sharing the illicit gains of the economic crimes, and limit exceptions to the provision of mutual legal assistance. This new treaty will allow the countries to create a comprehensive and consistent practice for mutual legal assistance for economic crimes, thus allowing prosecution of economic fugitives attempting to escape justice while protecting the national interests of both countries.

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INTRODUCTION

Illicit financial flows from the proceeds of corruption have become a major problem for many countries, including some of the world's largest economies.¹ It is estimated that in 2013 alone, more than one trillion U.S. dollars (“USD”) in illicit financial flows left the developing world, some of which are in the hands of corrupt officials.² Officials fleeing from many countries, including Colombia, Panama, and China, come to the United States to hide their wealth, taking ad-

¹ DEV KAR & JOSEPH SPANJERS, GLOBAL FIN. INTEGRITY, ILLICIT FINANCIAL FLOWS FROM DEVELOPING COUNTRIES: 2004–2013, at 8–9 (2015), http://www.gfintegrity.org/wp-content/uploads/2015/12/IFF-Update_2015-Final-1.pdf [<https://perma.cc/4G3H-NVRG>].

² *Illicit Financial Flows*, GLOBAL FIN. INTEGRITY, <http://www.gfintegrity.org/issue/illlicit-financial-flows> [<https://perma.cc/9D2X-RLGX>].

vantage of “lax enforcement of U.S. laws and gaps in immigration and financial regulations.”³ In the U.S. market, many quickly convert stolen assets into ownership of trusts and limited liability companies to hide their assets and real-estate purchases.⁴ In 2015, China released a list of its 100 most-wanted economic fugitives, forty of whom were believed to have fled to the United States.⁵ To recover those individuals and their allegedly stolen assets, China has been working to encourage those individuals to return to China.⁶ This campaign, Operation Skynet, targets individuals suspected of economic crimes who have fled abroad.⁷ One such individual, Yang Xiuzhu, recently returned to China from the United States.⁸ Yang was a Chinese public official accused of embezzling USD 40 million while serving in her official post.⁹ Yang was arrested by immigration authorities in the United States in 2014, when she tried to enter the country with a false passport, and was held at a detention facility in New Jersey.¹⁰ Yang surrendered to Chinese authorities because she wanted to return to China, reportedly to receive medical treatment, claiming that she did not receive adequate care in the United States.¹¹ In November 2016, the United States agreed to return her to China.¹²

Pursuit of economic fugitives has been the goal of Chinese authorities in Operation Skynet and Operation Fox Hunt.¹³ The United

³ Kyra Gurney et al., *Suspected of Corruption at Home, Powerful Foreigners Find Refuge in the U.S.*, PROPUBLICA (Dec. 9, 2016, 9:00 AM), <https://www.propublica.org/article/corrupt-foreign-officials-find-refuge-in-united-states> [<https://perma.cc/JF59-8AWQ>].

⁴ *See id.*

⁵ *See* Mimi Lau, *40 of China's 100 Most-Wanted Fugitives Live in the US*, BUS. INSIDER (Apr. 23, 2015, 12:11 AM), <http://www.businessinsider.com/40-of-chinas-100-most-wanted-fugitives-live-in-the-us-2015-4> [<https://perma.cc/VDQ3-4K4Q>].

⁶ *Id.*

⁷ *China's Most-Wanted Economic Fugitive Yang Xiuzhu Surrenders*, BBC (Nov. 16, 2016), <http://www.bbc.com/news/world-asia-china-37998796> [<https://perma.cc/76NZ-N5PV>].

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* This Note refers to both Operations Skynet and Fox Hunt, but there is some uncertainty regarding the relationship between these two programs. It is unclear whether one preceded the other or they continue to operate simultaneously, and it is difficult to determine whether they do the same thing or involve different methods. *See, e.g.*, Keira Lu Huang, *China Is Using an Operation Called “Skynet” to Track Down Fugitive Corrupt Officials*, BUS. INSIDER (Mar. 27, 2015, 12:12 AM), <http://www.businessinsider.com/china-is-using-an-operation-called-skynet-to-track-down-fugitive-corrupt-officials-2015-3> [<https://perma.cc/VDQ3-4K4Q>]; Lau, *supra* note 5; Richard L. Cassin, *China ‘Fox Hunt’ Nabs White Collar Fugitives*, FCPA BLOG (Mar. 27, 2017, 7:28 AM), <http://www.fcpcbog.com/blog/2017/3/27/china-fox-hunt-nabs-white>

States has expressed dissatisfaction with this type of voluntary surrender because of questions about the validity of the actions taken by Chinese agents in the United States and the methods used to return the fugitives.¹⁴ Despite the concerns of the United States, China has continued the program because it has proven effective. In 2016 alone, 951 economic fugitives were captured from seventy-two countries as part Operation Fox Hunt.¹⁵

To facilitate the prosecution of corrupt officials and address the United States' concerns about the validity of these prosecutions, the United States and China should enter into a mutual legal assistance treaty ("MLAT")¹⁶ focused on establishing cooperation for the prosecution of economic criminals and the return of stolen assets. This treaty will allow China to address corruption without violating the United States' sovereignty or operating outside the law. Each country has legitimate concerns about economic criminals taking refuge in the other, out of reach of their respective law enforcement authorities. Under this treaty regime, both countries will continue to protect their interests in judicial integrity and in upholding international human rights obligations. In addition, a new agreement could facilitate greater cooperation between the countries in the future, force China to consider reforming its legal system, and serve as a model for agreements between other countries on prosecuting economic crimes.

Part I will address the growing problem of corruption and its impact on both the United States and China. This Part will explain why both countries need a better foundation for cooperation to stem the flow of illicit funds and economic criminals. Part II will introduce the concept of mutual legal assistance ("MLA") and describe previous attempts at cooperation between the United States and China on criminal prosecutions. This will demonstrate that making determinations on a case-by-case basis about whether to provide assistance is ineffective for many economic crimes. Part III will present an overview of potential solutions that would allow the United States and China to

collar-fugitives.html [https://perma.cc/JF8S-YEFS]. Whatever their methods, both programs involve the tracing of illicit assets and their owners overseas. *See, e.g.*, Lau, *supra* note 5.

¹⁴ Charlotte Gao, *China's Overseas Anticorruption Operation Bags Another Suspect*, DIPLOMAT (Sept. 27, 2017), <https://thediplomat.com/2017/09/chinas-overseas-anticorruption-operation-bags-another-suspect>.

¹⁵ Cassin, *supra* note 13.

¹⁶ Sometimes this is referred to as a Mutual Legal Assistance Agreement ("MLAA"). *See, e.g.*, David Whedbee, *The Faint Shadow of the Sixth Amendment: Substantial Imbalance in Evidence-Gathering Capacity Abroad Under the U.S.-P.R.C. Mutual Legal Assistance Agreement in Criminal Matters*, 12 PAC. RIM L. & POL'Y J. 561, 561 (2003) (referring to the "U.S.-P.R.C. MLAA").

cooperate more efficiently, including signing an extradition treaty between the two countries, using the United Nations Convention Against Corruption (“UNCAC”) as a basis for MLA requests, and developing a new bilateral framework to address economic crimes. Further, Part III will show that revision to the MLA framework is the most effective way to enhance cooperation between the United States and China. Part IV will provide analysis of and guidance on provisions that should be included in a new MLAT: an asset-sharing agreement, limitations on the exceptions to the provision of MLA, and a streamlined process for responding to MLA requests about economic crimes.

I. CHINESE EFFORTS TO COMBAT CORRUPTION AND THE U.S. RESPONSE

From 2004 to 2013, China lost more than USD 1.3 trillion in illicit financial outflows from the country.¹⁷ Global Financial Integrity¹⁸ estimates that fifty-five percent of illicit finances end up in developed countries, including the United States.¹⁹ To stem this loss of financial resources, President Xi Jinping of China instituted a comprehensive anti-corruption strategy for China in 2012.²⁰ The campaign had a two-pronged approach: domestically, China amended several laws to criminalize corruption offenses; internationally, China engaged with other countries to seek the extradition of economic fugitives.²¹ China amended its criminal law statute²² to include several new offenses—including bribery of foreign officials—and its Law Against Unfair

¹⁷ KAR & SPANJERS, *supra* note 1, at 8.

¹⁸ Global Financial Integrity is a nonprofit advocacy and research organization based in Washington, D.C., that promotes financial transparency and works to stop the flow of illicit funds in the international financial system. *About*, GLOBAL FIN. INTEGRITY, <http://www.gfintegrity.org/about> [<https://perma.cc/HU9J-P6UZ>].

¹⁹ *Illicit Financial Flows*, *supra* note 2.

²⁰ See Tom Mitchell & Christian Shepherd, *China Steps Up ‘Fox Hunt’ Campaign*, FIN. TIMES (Jan. 28, 2016), <https://www.ft.com/content/f6a1c75c-c573-11e5-808f-8231cd71622e> [<https://perma.cc/KJ36-V3TQ>]; Gabriel Wildau, *China and US to Co-operate on Corrupt Asset Seizures, Deportations*, FIN. TIMES (Sept. 27, 2015), <https://www.ft.com/content/0f6d756a-64e4-11e5-97e9-7f0bf5e7177b> [<https://perma.cc/8HVP-57EG>].

²¹ See Oliver Duggan, *How China’s ‘Anti-extravagance’ Laws Left Diageo’s Glass Half Empty*, TELEGRAPH (July 31, 2014, 11:19 AM), <http://www.telegraph.co.uk/finance/newsbysector/epic/dge/11002474/How-Chinas-anti-extravagance-laws-left-Diageos-glass-half-empty.html> [<https://perma.cc/7FL9-E7CZ>]; Tom Phillips, *China Tracks ‘Corrupt’ Fugitives to Britain*, TELEGRAPH (Apr. 23, 2015, 12:12 PM), <http://www.telegraph.co.uk/news/worldnews/asia/china/11557711/China-tracks-corrupt-fugitives-to-Britain.html> [<https://perma.cc/SHT8-9XF4>].

²² Criminal Law (promulgated by the Standing Comm. Nat’l People’s Cong., July 1, 1997, rev’d Mar. 14, 1997, effective Oct. 1, 1997) (China), 1997 P.R.C. LAWS, <http://www.cecc.gov/resources/legal-provisions/criminal-law-of-the-peoples-republic-of-china> [<https://perma.cc/3WXZ-JAEL>].

Competition²³ to address commercial bribery.²⁴ Even with these changes to its domestic law, China needs to address the transnationalization of economic crimes. Many of the sought-after financial fugitives have fled overseas to countries that do not have extradition treaties with China, making it difficult for China to pursue its anti-corruption campaign across national borders within the existing legal framework.²⁵

In response to the large illicit financial outflows from corruption and other unlawful economic activities, President Xi pushed for reform of Chinese criminal and company law to increase the penalties on those participating in corrupt acts and other financial crimes.²⁶ Part of that strategy has involved tracking stolen assets across international boundaries, including into the United States,²⁷ which does not have an extradition treaty with China.²⁸ The United States government has faced criticism from Beijing over a perceived lack of cooperation on the return of corrupt officials and their stolen assets.²⁹ Because of this lack of cooperation, China initiated Operations Skynet and Fox Hunt, directed at returning corrupt officials and their stolen assets to China, with or without the cooperation of foreign governments.³⁰ Under these operations, Chinese agents have traveled to countries that do not have extradition treaties with China to persuade economic fugitives to return to China of their own volition.³¹ The United States has

²³ Law Against Unfair Competition (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993), 1993 P.R.C. LAWS, <http://www.cecc.gov/resources/legal-provisions/prc-unfair-competition-law-english-and-chinese-text> [<https://perma.cc/PRH7-YR3Y>].

²⁴ See Emily Tran, Comment, *Endemic Corruption in the People's Republic of China*, 17 SAN DIEGO INT'L L.J. 295, 297–98 (2016).

²⁵ See Anthony Kuhn, *When Corrupt Chinese Officials Flee, the U.S. Is a Top Destination*, NPR (June 23, 2015, 4:36 PM), <http://www.npr.org/sections/parallels/2015/06/23/416828057/when-corrupt-chinese-officials-flee-the-u-s-is-a-top-destination> [<https://perma.cc/2NW7-8Q7C>]; Tom Mitchell et al., *Extradition Battle Looms Large over US-China Relations*, FIN. TIMES (Mar. 13, 2016), <https://www.ft.com/content/0830a420-e77a-11e5-bc31-138df2ae9ee6> [<https://perma.cc/HH7C-LJKV>].

²⁶ See Tran, *supra* note 24, at 300.

²⁷ *China Tracks 800 Bln Embezzled Money Under Operation Skynet*, CHINA DAILY, http://www.chinadaily.com.cn/china/2015-10/10/content_22154249.htm [<https://perma.cc/VSR7-546C>] (last updated Oct. 10, 2015, 9:09 PM).

²⁸ Kuhn, *supra* note 25.

²⁹ See Mitchell et al., *supra* note 25; Mitchell & Shepherd, *supra* note 20.

³⁰ See Mark Mazzetti & Dan Levin, *Obama Administration Warns Beijing About Covert Agents Operating in U.S.*, N.Y. TIMES (Aug. 16, 2015), http://www.nytimes.com/2015/08/17/us/politics/obama-administration-warns-beijing-about-agents-operating-in-us.html?_r=0 [<https://perma.cc/MM6R-HWKA>].

³¹ *Id.*; Mitchell & Shepherd, *supra* note 20.

expressed its disapproval of these Chinese actions and sees them as violating U.S. sovereignty.³² Despite this strong disapproval, China has continued the practice, which has led to the capture of 2,566 fugitives from ninety countries and the recovery of about USD 1.75 billion in stolen assets.³³

Despite forty of China's 100 most-wanted corrupt officials fleeing to the United States, the United States does not usually extradite individuals to China because of concerns over human rights violations.³⁴ The United States, however, has agreed on several occasions to extradite specific Chinese citizens back to China, indicating the United States' interest in addressing this problem and its recognition of Chinese concerns about impunity for corruption.³⁵ The United States has an incentive to cooperate on this issue because of other ongoing concerns with China in other criminal matters, such as narcotics trafficking and immigration.³⁶ On the other hand, the United States remains uneasy about covert actions by the Chinese and does not approve of the tactics used by Chinese operatives in Operation Skyenet.³⁷ Although details about the persuasion methods remain limited, some suspects have reported the use of strong-arm tactics, including threats against family members remaining in China and face-to-face intimidation.³⁸ In 2015, President Obama publicly warned the Chinese against using covert officials to track fugitives who have fled to the United States.³⁹ The Department of Justice has also expressed concern with the evidence that Chinese authorities have presented when asking for U.S. assistance with tracking and returning fugitives.⁴⁰

³² See Mazzetti & Levin, *supra* note 30; Mitchell & Shepherd, *supra* note 20.

³³ Cassin, *supra* note 13. Although these numbers come from reports of the Chinese state media services and exact numbers may differ, many commentators agree that the program has been successful. See, e.g., Mitchell & Shepherd, *supra* note 20; Phillips, *supra* note 21.

³⁴ See Lau, *supra* note 5; Mitchell & Shepherd, *supra* note 20.

³⁵ See, e.g., *China's Most-Wanted Economic Fugitive Yang Xiuzhu Surrenders*, *supra* note 7. The facts of Yang's situation are described in the introduction. See *supra* notes 7–12 and accompanying text; see also Wildau, *supra* note 20.

³⁶ Nike Ching, *High-Level US-China Talks Focus on Immigration, Fugitives*, VOICE OF AM. (Oct. 4, 2017, 11:35 PM), <https://www.voanews.com/a/us-china-talks-focus-on-immigration-fugitives/4057291.html> [<https://perma.cc/C4N2-CSMG>].

³⁷ See *id.*; Mazzetti & Levin, *supra* note 30.

³⁸ Affan Chowdhry, *China's Corruption Crackdown Ruffles International Feathers*, GLOBE & MAIL (Mar. 24, 2017), <http://www.theglobeandmail.com/news/world/chinas-corruption-crackdown-ruffles-international-feathers/article31979594> [<https://perma.cc/SUAM-5TUF>]; see Mazzetti & Levin, *supra* note 30.

³⁹ Mazzetti & Levin, *supra* note 30.

⁴⁰ *Id.*

China's choice to circumvent the legal bases for retrieval of economic criminals, such as extradition or joint criminal investigations, can be explained by the difficulty they have faced prosecuting corrupt officials who have fled abroad using only these means.⁴¹ The United States' concern with this circumvention of the law can be understood as a broader concern about the criminal justice system in China and the human rights abuses often alleged to take place there.⁴² The United States has frequently condemned the treatment of prisoners in China, as well as the use of the criminal justice system to prosecute political dissidents.⁴³ China's corruption laws set forth severe punishments, including heavy fines, jail time, confiscation of property, and, in some circumstances, even the death penalty.⁴⁴ In declining to enter into an extradition treaty or other prisoner-transfer agreements with China, the United States has often cited these concerns as reasons not to cooperate with Chinese efforts to retrieve economic criminals from the United States.⁴⁵ However, the United States and China both have an interest in reaching a solution that allows them to work together effectively and efficiently on legitimate criminal prosecutions for economic crimes. Any solution for cooperation on economic crimes must address both China's concerns about the ability to prosecute and retrieve the stolen assets and the United States' uncertainty about the validity of these prosecutions. The United States and China have made attempts to cooperate on criminal matters in the past, but the MLA relationship between the two countries has historically been characterized by inefficiency and a lack of trust.

II. MLA AND A BRIEF HISTORY OF UNITED STATES–CHINA ATTEMPTS AT COOPERATION

In the late 1980s and early 1990s, there was a growing recognition that the transnationalization of crime was burdening countries' economies by creating a large, illicit economy operating in the shadows of

41 See, e.g., Ching, *supra* note 36; Mitchell et al., *supra* note 25.

42 U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., China (Includes Tibet, Hong Kong, and Macau) 2015 Human Rights Report 1–2 (2015), <https://www.state.gov/documents/organization/252967.pdf> [<https://perma.cc/EE4N-R3EF>] (finding that many human rights abuses occur in the Chinese judicial system, including coercive use of laws, extrajudicial killings, abuse of minority rights, illegal detentions, torture, lack of due process, political control of the judiciary, and enforced disappearances).

43 *Id.*

44 Tran, *supra* note 24, at 299.

45 Matthew Bloom, Note, *A Comparative Analysis of the United States's Response to Extradition Requests from China*, 33 YALE J. INT'L L. 177, 203 (2008).

the formal economy.⁴⁶ In response to this, several regional and international bodies began the process of developing international treaties to address corruption and other transnational crimes.⁴⁷ An important aspect of these treaties was the provision of MLA as a way for countries to cooperate with each other in obtaining evidence, prosecuting cases, and tracing stolen assets.⁴⁸ MLA is important in any attempt at targeting and eliminating international crime, but the history of United States–China cooperation in MLA requests and criminal prosecutions illustrates that cooperation is not always easy. The current system between the two countries is inefficient, inconsistent, unpredictable, and ineffective at battling international corruption.

A. *The Development of MLA and the 2001 MLAT*

MLA became recognized as an important aspect of coordinating anti-corruption work when the transnationalization of crime led to the fallout from crimes committed in one country reverberating across the globe.⁴⁹ The idea behind MLA is that countries can form bilateral or multilateral relationships that allow them to cooperate on the prosecution of a particular criminal case.⁵⁰ As people began easily moving between countries to commit multiple crimes, carrying the proceeds of their illicit activities with them, it became important for countries to

⁴⁶ Paulette Lloyd, Beth A. Simmons & Brandon M. Stewart, *Combating Transnational Crime: The Role of Learning and Norm Diffusion in the Current Rule of Law Wave*, in *RULE OF LAW DYNAMICS: IN AN ERA OF INTERNATIONAL AND TRANSNATIONAL GOVERNANCE* 153, 154–56 (Michael Zürn et al. eds., 2012).

⁴⁷ Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 *J. INT'L ECON. L.* 191, 193 (2005). The first organization to take up international anti-corruption efforts was the Organization of American States (OAS). *See id.* In 1996, they signed the OAS Convention Against Corruption. *Id.* This was followed by the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) and the European Union Corruption Convention in 1997. *Id.* at 195, 201. In 2000, the United Nations negotiated its first anti-corruption and transnational crime treaty. *Id.* at 203. This treaty, the UN Convention Against Transnational Organized Crime, is often recognized as the first important step to a “truly global approach” to the transnationalization of crime. *See* U.N. OFFICE ON DRUGS & CRIME, *LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME & THE PROTOCOLS THERETO*, at xvii–xviii, U.N. Sales No. E.05.V.2 (2004).

⁴⁸ *See* KEVIN M. STEPHENSON ET AL., *WORLD BANK & UNODC, BARRIERS TO ASSET RECOVERY: AN ANALYSIS OF THE KEY BARRIERS AND RECOMMENDATIONS FOR ACTION 1* (2011).

⁴⁹ *See* U.N. OFFICE ON DRUGS & CRIME, *supra* note 47, at xvi–xvii.

⁵⁰ *See* Yvon Dandurand, *Strategies and Practical Measures to Strengthen the Capacity of Prosecution Services in Dealing with Transnational Organized Crime, Terrorism and Corruption*, 47 *CRIME, L., & SOC. CHANGE* 225, 226 (2007).

form these relationships to successfully combat crime and trace stolen proceeds.⁵¹ The United Nations (“UN”) passed a resolution on a model agreement on MLA in criminal matters to encourage and provide guidance to countries who wished to cooperate on criminal investigations and prosecutions.⁵² The UN Model Treaty on Mutual Assistance in Criminal Matters offers a common format for countries to draw from when creating their own MLATs.⁵³ The terms of the Model Treaty cover aspects of the investigative process and the provision of assistance in obtaining evidence once a prosecution has begun.⁵⁴ The Model Treaty does not, however, address when, where, or how a particular prosecution should take place.⁵⁵

In 2004, the UN member states came together to negotiate the UN Convention Against Corruption (“UNCAC”).⁵⁶ The treaty took effect in 2005, and the United States and China both became parties to the treaty in 2006.⁵⁷ The UNCAC creates a comprehensive framework for international corruption offenses by providing a list of mandatory offenses;⁵⁸ terms for freezing, seizure, and confiscation of assets;⁵⁹ provisions for MLA;⁶⁰ guidelines for asset recovery;⁶¹ and advice for the use of bilateral agreements to enhance the provisions of the UNCAC agreement.⁶² The specific mandatory offenses listed in the convention include bribery, embezzlement, money laundering, participation, and obstruction of justice.⁶³ The UNCAC also contemplates the formulation of additional terms of agreement between countries through the use of bilateral MLATs.⁶⁴

⁵¹ See *id.*

⁵² See G.A. Res. 45/117 (Dec. 14, 1990).

⁵³ See *id.* The Model Treaty on Mutual Assistance in Criminal Matters is very similar to the China-U.S. Mutual Legal Assistance Agreement signed in 2001. Compare *id.* with Agreement on Mutual Legal Assistance in Criminal Matters, China-U.S., June 19, 2000, 80 Stat. 271, T.I.A.S. No. 13,102.

⁵⁴ See G.A. Res. 45/117, *supra* note 52, at art. 1.

⁵⁵ See *id.*

⁵⁶ Webb, *supra* note 47, at 205.

⁵⁷ *Signature and Ratification Status*, UNODC, <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> [<https://perma.cc/U6PZ-6BTv>] (last updated Oct. 3, 2017).

⁵⁸ United Nations Convention Against Corruption arts. 15–17, 23, 25, 27(1), Oct. 31, 2003, 2349 U.N.T.S. 42146.

⁵⁹ *Id.* at art. 31.

⁶⁰ *Id.* at arts. 44–50.

⁶¹ *Id.* at arts. 51–58.

⁶² *Id.* at art. 59.

⁶³ *Id.* at arts. 15–17, 23, 25, 27(1).

⁶⁴ *Id.* at art. 46(30).

In the late 1990s, the United States and China negotiated an agreement on MLA between the two countries.⁶⁵ These negotiations resulted in the 2001 United States–China MLA agreement (“2001 MLAT”), which specifies an official framework for legal assistance to be provided by the United States to China and vice versa.⁶⁶ The treaty includes cooperation in all criminal matters.⁶⁷ The 2001 MLAT was negotiated before the UNCAC was written, which means it does not take into account the latest views on corruption prevention and prosecution.⁶⁸ The 2001 MLAT is a broad yet brief treaty intended to cover any criminal prosecution, and it contemplates the continued use of informal mechanisms of cooperation between the countries.⁶⁹

The 2001 MLAT contains a provision allowing countries to refuse assistance in certain situations.⁷⁰ While most MLATs provide for such exceptions, these exceptions are more expansive in the 2001 MLAT than in other MLATs.⁷¹ For example, in the 2001 MLAT, the political offense exception states that assistance may be denied if

the request relates to a political offense or the request is politically motivated or there are substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, punishing, or otherwise proceeding against a person on account of the person’s race, religion, nationality, or political opinions.⁷²

In contrast, in several bilateral MLAT treaties that the United States has with other countries, the political offense exception is limited to requests relating to a “political offense.”⁷³ Article 3(1)(a) of the 2001 MLAT creates another a broad exception that “gives the parties ample grounds to deny requests, lessening the compulsion re-

⁶⁵ Agreement on Mutual Legal Assistance in Criminal Matters, China-U.S., *supra* note 53.

⁶⁶ *Id.*

⁶⁷ *Id.* at art. 1(1).

⁶⁸ The U.N. Convention Against Corruption was not finalized until October 31, 2003. United Nations Convention Against Corruption, *supra* note 58.

⁶⁹ Agreement on Mutual Legal Assistance in Criminal Matters, China-U.S., *supra* note 53. The treaty consists of twenty-three articles, which cover the central authority, the request, reasons for rejecting the request, and the treatment of various evidences. *Id.* The treaty does not provide guidance on the process of approving requests, gathering evidence, time and legal constraints, asset sharing, or joint prosecutions. *Id.*

⁷⁰ *Id.* at art. 3.

⁷¹ Anna MacCormack, Note, *The United States, China, and Extradition: Ready for the Next Step?*, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 445, 467 (2009).

⁷² Agreement on Mutual Legal Assistance in Criminal Matters, China-U.S., *supra* note 53, at art. 3(1)(d).

⁷³ MacCormack, *supra* note 71, at 465 n.109.

quired by the Agreement.”⁷⁴ In the Model Treaty, there are six narrowly tailored grounds for refusing requests for MLA; in the 2001 MLAT, there are seven more expansive methods for the United States and China to avoid giving MLA.⁷⁵

Another problem with the 2001 MLAT is the lack of a concrete provision on asset sharing, which is especially significant for corruption offenses. Although there is a provision that allows for assets to be seized and forfeited as part of a request for MLA, it does not contain any information about what should happen with illicit proceeds from crimes or specify how to handle illicit funds or requests for their return.⁷⁶ Since most economic crimes involve the recovery or attempted recovery of illicit funds, this gap is particularly problematic in dealing with corruption offenses.⁷⁷ Corruption offenses present a unique opportunity for countries to cooperate because of the possibility of asset recovery, but without the certainty of a fair asset-sharing procedure, there is no assurance of regaining the proceeds of the economic crimes. Thus, the failure of the 2001 MLAT to provide a concrete regime for asset sharing has been an obstacle to cooperation on economic crimes.

The 2001 MLAT prescribes the current framework for formally dealing with requests for MLA between the United States and China, although both countries are parties to the UNCAC and can also make requests under the MLA provisions of that treaty.⁷⁸ “Though the [2001 MLAT] was a significant step, cooperation up to and including the rendition of individuals is still mostly dealt with on a case-by-case basis, leaving the law enforcement relationship rather unfixed.”⁷⁹ The 2001 MLAT leaves much discretion to each state as to when, how, and which requests for MLA will be answered.⁸⁰

The current MLA process is timeconsuming and tedious. A central authority is designated in each country, and requests are made through that authority; in the United States, the Office of Interna-

⁷⁴ *Id.* at 465.

⁷⁵ Compare Agreement on Mutual Legal Assistance in Criminal Matters, China-U.S., *supra* note 53, at art. 3(1), with G.A. Res. 45/117, *supra* note 52, at art. 4(1).

⁷⁶ See Agreement on Mutual Legal Assistance in Criminal Matters, China-U.S., *supra* note 53, at art. 16.

⁷⁷ See STEPHENSON ET AL., *supra* note 48, at 2–3.

⁷⁸ See *id.* Many countries use their bilateral MLATs where they exist, rather than using multilateral conventions providing for MLA. See Webb, *supra* note 47, at 210.

⁷⁹ MacCormack, *supra* note 71, at 471.

⁸⁰ See Agreement on Mutual Legal Assistance in Criminal Matters, China-U.S., *supra* note 53, at art. 3.

tional Affairs (OIA) at the Department of Justice serves as the central authority.⁸¹ The OIA sends the request to a U.S. Attorney, who reviews the request and sends it to be approved by a magistrate.⁸² These requests are not given any priority in the magistrate's schedule and may not be reviewed for months.⁸³ Once the request is approved, the local law enforcement agency will collect the evidence and submit it back to the OIA.⁸⁴ The OIA will then send the evidence to the requesting state.⁸⁵ This process takes ten months to complete on average, although requests through letters rogatory can take a year or more to obtain evidence.⁸⁶ This arduous process for obtaining evidence has deterred successful cooperation on economic crimes between the United States and China.

B. A History of United States–China Attempts at Cooperation in Criminal Matters

The U.S.-China relationship has historically been fraught with difficulty, and the countries' efforts to cooperate in criminal matters are no different. The first effort at MLA cooperation between the United States and China involved drug trafficking and resulted in an embarrassing diplomatic incident.⁸⁷ In 1988, a shipment of heroin traveling from China to San Francisco was intercepted by the Chinese.⁸⁸ The Chinese took the man running the ship, Wang, into custody, but a "mastermind" was directing the operation from the United States.⁸⁹ Evidence of the various crimes associated with the drug-running operation was located in both the United States and China.⁹⁰ The United States built its case against the alleged mastermind, Leung Tak Lun, but required the testimony of Wang in order to prove his involvement in the scheme.⁹¹ Wang was brought to the United States and put on

⁸¹ Peter Swire & Justin D. Hemmings, *Mutual Legal Assistance in an Era of Globalized Communications: The Analogy to the Visa Waiver Program*, 71 N.Y.U. ANN. SURV. AM. L. 687, 697 (2016).

⁸² *Id.* at 698.

⁸³ *See id.* at 699–700.

⁸⁴ *See id.* at 700.

⁸⁵ *Id.*

⁸⁶ *Id.* at 692, 700.

⁸⁷ *See* MacCormack, *supra* note 71, at 461.

⁸⁸ *Id.*

⁸⁹ *See id.* at 461–62 (citing *Xiao v. Reno*, 837 F. Supp. 1506, 1514 (N.D. Cal. 1993), *aff'd*, 81 F.3d 808, 821 (9th Cir. 1996)).

⁹⁰ *See id.*

⁹¹ *See* William W. Tanner, *The Case of Wang Zong Xiao v. Reno: The International Implications of Prosecutorial Misconduct*, 24 GA. J. INT'L & COMP. L. 155, 155–56 (1994). China was handling the prosecution of Wang and other Chinese elements of the conspiracy. *Id.*

the witness stand, where he revealed that his confession in China had been coerced and that he had experienced torture by Chinese law enforcement officials.⁹² A subsequent investigation revealed that U.S. prosecutors were aware of this and put him on the stand anyway, knowing a U.S. court would not be able to accept his testimony.⁹³ The court ordered that Wang be released in the United States and forbade his extradition back to China.⁹⁴ The result was a diplomatic debacle that embarrassed both countries, as Wang was granted political asylum and the U.S. prosecutor on the case was suspended.⁹⁵ Both sides were unhappy with the result of their attempt at cooperation in the Wang case and avoided future cooperation with each other, even though this often created problems for both countries.⁹⁶

A more recent example of a case where lack of communication and cooperation between the United States and China cost time and resources is the Sister Ping case.⁹⁷ After years of investigation, Sister Ping was indicted in New York in 1994 for money laundering, alien smuggling, kidnapping, and hostage taking between the United States and China.⁹⁸ She fled to China, where she continued to run her business from her hometown.⁹⁹ In the course of two decades of work, she is suspected to have amassed USD 40 million in laundered funds.¹⁰⁰ The United States, rather than cooperate with Chinese authorities, tracked her movements using Fujian informants for five years.¹⁰¹ Eventually, she was caught in Hong Kong and finally apprehended by United States authorities.¹⁰² The United States and Hong Kong had an extradition treaty that enabled them to work together to recover her,¹⁰³ though it took several years for her to exhaust all her remedies in Hong Kong before she was extradited back to the United States to stand trial in 2005.¹⁰⁴ Thus, even where an extradition treaty or an

⁹² See MacCormack, *supra* note 71, at 462.

⁹³ See *id.* (citing *Xiao*, 837 F. Supp. at 1551–53).

⁹⁴ See Constance L. Hays, *Drug Case Derails U.S.-China Law Tie*, N.Y. TIMES (Feb. 20, 1994), <http://www.nytimes.com/1994/02/20/us/drug-case-derails-us-china-law-tie.html> [<https://perma.cc/J3LW-TSV4>].

⁹⁵ See Tanner, *supra* note 91, at 159; see also MacCormack, *supra* note 71, at 462.

⁹⁶ See Tanner, *supra* note 91, at 159, 165; see also MacCormack, *supra* note 71, at 462–63.

⁹⁷ See MacCormack, *supra* note 71, at 472–74.

⁹⁸ *Id.*; Patrick Radden Keefe, *The Snakehead*, NEW YORKER (Apr. 24, 2006), <https://www.newyorker.com/magazine/2006/04/24/the-snakehead> [<https://perma.cc/Q8D7-LU4Q>].

⁹⁹ Keefe, *supra* note 98.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See MacCormack, *supra* note 71, at 473.

¹⁰⁴ Keefe, *supra* note 98.

MLAT exists, the process for extradition and cooperation is often onerous and resource-consuming—assuming the parties agree to cooperate with each other.

Although the 2001 MLAT was intended to increase cooperative efforts, they have still proven difficult. In 2001, the United States deported a Chinese national, Qin Hong, who had allegedly engaged in fraud.¹⁰⁵ Hong entered the country on a Panamanian passport.¹⁰⁶ After the Chinese authorities were able to show that he had fraudulently entered the country, the United States deported him.¹⁰⁷ The U.S. court sent him to Panama, however, because that was the country on the passport, and the executive branch had to informally urge Panama through diplomatic channels to send him back to China.¹⁰⁸ In another case in 2009, the United States and China successfully cooperated to bring Yu Zhendong to justice after he embezzled USD 485 million from the Bank of China and fled to the United States.¹⁰⁹ Even though some cases could be considered successes, they demonstrate the complexity of any attempt at MLA cooperation between the United States and China. These successes are few compared to the instances in which the United States and China have been unable to cooperate or have even avoided attempting to cooperate although it might have made the investigation easier.¹¹⁰

In Canada, the case of Yang Fong is indicative of the problems faced by the United States and China when they attempt to cooperate.¹¹¹ Canada and China did not have an extradition treaty, but China was hoping to recover Yang for a computer fraud case involving USD 130,000.¹¹² In 2000, Canada agreed to extradite Yang if China promised to give him no more than a ten-year sentence.¹¹³ China agreed, but when Yang reached China, he was promptly executed without ex-

¹⁰⁵ See Bloom, *supra* note 45, at 201; David S. Cloud, *FBI Aims to Build Goodwill with Chinese by Cooperating on Cases*, WALL ST. J., Sept. 4, 2001, at A24.

¹⁰⁶ Bloom, *supra* note 45, at 201.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Press Release, Dep't of Justice, Office of Pub. Affairs, Former Bank of China Managers and Their Wives Sentenced for Stealing More than \$485 Million, Laundering Money Through Las Vegas Casinos (May 6, 2009), <https://www.justice.gov/opa/pr/former-bank-china-managers-and-their-wives-sentenced-stealing-more-485-million-laundering> [<https://perma.cc/DY56-YUYS>].

¹¹⁰ See, e.g., Gurney et al., *supra* note 3.

¹¹¹ See Bloom, *supra* note 45, at 196.

¹¹² James Brooke, *Canada's Haven: For Notorious Fugitives, Too?*, N.Y. TIMES (Dec. 29, 2000), <http://www.nytimes.com/2000/12/29/world/canada-s-haven-for-notorious-fugitives-too.html> [<https://perma.cc/J6DH-J6PP>].

¹¹³ *Id.*

planation.¹¹⁴ Although this particular case did not involve the United States, the occurrence may serve to justify the United States' continued reluctance to engage with China on MLA and extradition.

Successful cases show that cooperation between the two countries is possible despite diverse political and legal systems. Failures illustrate the problem with operating outside of an international agreement, but they also demonstrate that, with legal support, the United States and China might be able to effectively and efficiently manage their differences. In addition, the lack of attempts at cooperation between the countries, whether successful or unsuccessful, indicate that neither country is happy with the current state of the law, likely because of the difficulties of operating informally, outside of a predictable legal framework, or using the 2001 MLAT.¹¹⁵ “[T]he United States sometimes prefers not to seek Chinese assistance or that assistance is precluded because of the absence of an extradition treaty.”¹¹⁶ What all of these cases show is that there is not a decisive framework for handling requests for MLA or extradition between the two countries; each request is handled on a case-by-case basis with little or no guidance or transparency on how each decision is made. For these reasons, “China’s work to recover suspects has been done outside the framework of the [2001 MLAT].”¹¹⁷ To solve this problem, a revised MLAT is needed.

C. *Time for a New Framework for Cooperation*

Although cooperation between the United States and China is possible, the current framework does not provide the best support for cooperation, as evidenced by the number of cases in which both countries have chosen to operate outside the bounds of that framework. The case-by-case approach taken by both countries to handle requests for extradition or MLA has made it nearly impossible for either country to rely on the other for assistance in any particular case. This approach is especially inconvenient for economic crimes, which require a rapid response and constant communication for success.¹¹⁸ Because of the rapidity with which assets can be transferred or even converted

¹¹⁴ *Id.*

¹¹⁵ See *supra* Section II.A (describing challenges faced by China and the United States regarding the 2001 MLAT, including the lack of concrete provisions and the fact that many cases are still handled outside of the framework of the 2001 MLAT).

¹¹⁶ MacCormack, *supra* note 71, at 472.

¹¹⁷ *Id.* at 468.

¹¹⁸ STEPHENSON ET AL., *supra* note 48, at 9.

into other types of assets, it is vital for cases to move quickly to identify, trace, and obtain any stolen assets.

There are several aspects of economic crimes which should make cooperation more viable for these crimes than perhaps for others. First, most countries have signed on to the UNCAC, which means that they have agreed to criminalize the same types of behavior.¹¹⁹ Because both the United States and China have criminalized these offenses, there will be less problem enforcing the laws of the other country because there is no risk of criminalizing conduct in one country that is considered legal in the other.¹²⁰ Second, these types of offenses, where proof is validly shown, are not, on their face, “political” crimes. If the burden of proof is met to show that money obtained through illicit means is in the possession of a particular person, it is usually accepted that the economic crime was committed.¹²¹ The lack of concern over motive or a political reason for the crime makes concern about the validity of a verdict much less likely. Finally, because economic crimes often result in forfeiture of assets, the costs of prosecuting such crimes may be more easily borne because of the opportunity to recover costs in the final adjudication.

III. OTHER MECHANISMS FOR COOPERATION IN CRIMINAL MATTERS

As shown above, there are several problems with the current U.S.-China approach to MLA, including inefficiency, unpredictability, and inconsistency. These problems are particularly obvious when discussing economic crimes, which require a rapid response time, willingness to share sensitive information, and regular communication.¹²² Other avenues for cooperation in criminal matters include an extradition treaty between the United States and China, the use of the UNCAC framework for MLA requests, and the increased use of the 2001 MLAT, but none of these potential solutions addresses all the problems presented by the current framework. To comprehensively

¹¹⁹ United Nations Convention Against Corruption, *supra* note 58, at arts. 15–17, 23, 25–26, 27(1).

¹²⁰ As members of the UNCAC, both countries are required to criminalize the same offenses in their domestic laws. *Id.* The United States and China have both been reviewed by the Conferences of States Parties to the UNCAC and found to be in compliance with the UNCAC. See Conference of the States Parties to the United Nations Convention Against Corruption, Implementation Rev. Grp., U.N. Doc. CAC/COSP/IRG/I/4/1/Add.49, at 2–4 (Nov. 17, 2016); Conference of the States Parties to the United Nations Convention Against Corruption, Implementation Rev. Grp., U.N. Doc. CAC/COSP/IRG/I/1/1/Add.6, at 12–14 (Mar. 23, 2012).

¹²¹ See STEPHENSON ET AL., *supra* note 48, at 7.

¹²² See *id.* at 9.

improve United States–China cooperation on international anti-corruption, a new, bilateral treaty between the countries must be propagated to combat illicit financial flows and economic crimes.

A. *A New Extradition Treaty*

Although the United States and China do not have an extradition agreement, there have been instances in which the United States has agreed to send certain individuals back to China.¹²³ Each of these cases is considered individually and determined by the executive branch with little judicial oversight, once the secretary of state has made a decision to extradite outside of an extradition treaty.¹²⁴ Extradition, carried out under a treaty regime, is a multistep process that involves both the executive and judicial branches in the United States.¹²⁵ Extradition requests are sent to the Department of State, which reviews the evidence and makes a determination about whether extradition should be pursued.¹²⁶ A judge then reviews the determination by the Department of State and allows the defendant a chance to present the reasons why he should not be extradited.¹²⁷ The judge will also determine whether a treaty exists that can provide support for the extradition and whether there is probable cause for the defendant's guilt.¹²⁸

Because the United States and China do not have an extradition treaty, the United States resorts to “disguised extradition,” or use of immigration laws to return an individual to his or her home country.¹²⁹ This involves less judicial oversight than extradition because there is little review of the Department of State's decision to grant a return in this manner.¹³⁰ As the example of Yang Xiuzhu demonstrates,¹³¹ the United States frequently avoids sending Chinese criminals back to China because of concerns over the treatment of prisoners.¹³² Yang was held in the United States, where she would receive care and treat-

¹²³ See, e.g., MacCormack, *supra* note 71, at 467–68.

¹²⁴ See *Extradition*, U.S. DEP'T OF STATE, <https://www.state.gov/s/l/c66984.htm> [<https://perma.cc/L6MB-CZZD>]. A judge may enjoin a particular extradition because of concerns about human rights, such as in *Xiao v. Reno*, 837 F. Supp. at 1514. See Tanner, *supra* note 91, at 159.

¹²⁵ See *Extradition*, *supra* note 124.

¹²⁶ MacCormack, *supra* note 71, at 449.

¹²⁷ *Id.* at 449–50.

¹²⁸ *Id.* at 449.

¹²⁹ See M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 215–16 (6th ed. 2014).

¹³⁰ *Id.* at 215.

¹³¹ See *supra* Introduction.

¹³² See *China's Most-Wanted Economic Fugitive Yang Xiuzhu Surrenders*, *supra* note 7 (ex-

ment for her health problems.¹³³ She was only returned to China, through executive agreement, when she made a request to be sent home.¹³⁴ Ultimately, this use of “disguised extradition,” or extradition through executive agreement, is an unpredictable, extralegal, and, therefore, inappropriate method of dealing with wanted criminals. The process for determining whether extradition will be allowed in each case is arduous and often leads to inconsistent results because each case is examined individually.¹³⁵

The likelihood of the United States and China reaching an agreement on an extradition treaty in the near future seems remote, as the United States has continued to rebuff Chinese attempts to negotiate an extradition treaty.¹³⁶ The United States’ continued refusal to extradite individuals to China is based on a concern about individual rights in the Chinese justice system and repeated reports of human rights abuses.¹³⁷ It is unlikely that the United States and China will reach agreement on an extradition treaty as long as these concerns exist.¹³⁸ Although some in China have recognized that this is a consistent problem for them when requesting international cooperation on extradition and have indicated a willingness to improve the situation, the United States continues to signal “that China’s human rights record to date is not acceptable.”¹³⁹

B. *The UNCAC Framework*

The UNCAC also provides a framework for processing MLA requests to be processed between state parties to the Convention.¹⁴⁰ In Article 46, the UNCAC calls on state parties to “afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by

plaining that Yang was only returned to China after she requested it, even though China had requested her return for years).

¹³³ *Id.*

¹³⁴ Simon Denyer, *China’s Most-Wanted Corruption Suspect Repatriated from U.S. After 13 Years on the Run*, WASH. POST (Nov. 17, 2016), https://www.washingtonpost.com/world/chinas-most-wanted-corruption-suspect-repatriated-from-us-after-13-years-on-the-run/2016/11/16/b0f58b0a-abfd-11e6-8410-7613f8c1dae8_story.html?utm_term=.0abeea71d1b7 [https://perma.cc/ETE6-KX7U].

¹³⁵ See David Aronofsky & Jie Qin, *U.S. International Narcotics Extradition Cases: Legal Trends and Developments with Implications for U.S.–China Drug Enforcement Activities*, 19 MICH. ST. U. COLL. L.J. INT’L L. 279, 296 (2011); Bloom, *supra* note 45, at 181.

¹³⁶ See Bloom, *supra* note 45, at 181; Mitchell et al., *supra* note 25.

¹³⁷ See Bloom, *supra* note 45, at 202.

¹³⁸ *Id.* at 178–81.

¹³⁹ *Id.* at 214.

¹⁴⁰ United Nations Convention Against Corruption, *supra* note 58, at art. 46.

this Convention.”¹⁴¹ In addition, the Convention contemplates that state parties may share information even in the absence of an official request.¹⁴² Each state should have a designated central authority that can respond to and execute requests.¹⁴³ The Convention requires that requests be made in writing and contain information about the purpose of the request, the type of assistance required, the subject matter of the request, and relevant facts.¹⁴⁴ The UNCAC allows states to refuse to provide MLA if (1) the request is not made in conformity with the requirements of the Convention; (2) execution of the request would violate “sovereignty, security, *ordre public* or other essential interests”; (3) if domestic law prohibits obtaining the information; or (4) if the request is contrary to domestic law.¹⁴⁵ The Convention does, however, call on the requested state to consult the requesting state to determine whether certain conditions can be agreed to that would allow for assistance that would otherwise be denied.¹⁴⁶ Finally, the Convention notes that the costs of complying with a request should be covered by the requested state unless they are “substantial or extraordinary,” in which case the parties should come to a separate agreement.¹⁴⁷

Although the UNCAC appears to be a comprehensive framework for MLA and asset sharing, the framework is not frequently used.¹⁴⁸ Many developed countries continue to prefer the use of bilateral MLA agreements and extradition treaties to deal with corruption offenses.¹⁴⁹ In 2007, the United States made only four requests for MLA through the UNCAC framework.¹⁵⁰ Several problems arise from the use of the UNCAC, including the broad exceptions under the treaty, which countries can use to avoid providing assistance.¹⁵¹ As is nearly always true with multilateral international treaties, the language pro-

141 *Id.* at art. 46(1).

142 *Id.* at art. 46(4).

143 *Id.* at art. 46(13).

144 *Id.* at arts. 46(14–15).

145 *Id.* at art. 46(21).

146 *Id.* at art. 46(26).

147 *Id.* at art. 46(28).

148 *See Webb, supra* note 47, at 210.

149 *Id.*

150 U.S. DEP’T OF STATE, BUREAU OF INT’L ORG. AFF., UNITED STATES PARTICIPATION IN THE UNITED NATIONS, 2007, at 98 (2009), <https://www.state.gov/documents/organization/121905.pdf> [<https://perma.cc/JJA9-W33J>].

151 *See* United Nations Convention Against Corruption, *supra* note 58, at art. 46(9); STEPHENSON ET AL., *supra* note 48, at 2 (noting that the UNCAC framework is not a complete solution to the barriers facing countries when providing MLA and asset sharing).

fects the sovereignty of nations in how they choose to comply with the UNCAC.¹⁵² This limits the changes that countries will make to facilitate the MLA process through the treaty. In addition, there is no mechanism in the treaty that allows for monitoring of MLA requests and their completion. This has allowed countries to deprioritize MLA requests and has created a large backlog of requests.¹⁵³ For these reasons, the UNCAC framework is not strong enough to support a comprehensive framework for U.S.-China international cooperation on economic crimes.

C. *The 2001 MLAT*

As shown by the examples of past attempts at cooperation between the two countries, the 2001 MLAT has not been very successful at increasing MLA cooperation between the two countries and has led to both countries operating outside of the framework to achieve their objectives.¹⁵⁴ None of the past attempts constitutes a comprehensive solution to the problem presented by the Chinese anti-corruption campaign. The current system of using either the 2001 MLAT or the UNCAC has failed to successfully enable the cooperation of the United States and China on economic crimes. Given the United States' concerns with the rule of law and justice system in China, it seems unlikely that an extradition treaty would be a legitimate or popular solution to the problem. Although the United States has extradited some officials to China, their reluctance to do so indicates that this is not a reliable or appropriate solution in every case. A new MLAT should be propagated to address the concerns of both countries through a comprehensive MLA framework.

IV. NEW BILATERAL MLAT

The United States and China should enter a new bilateral MLAT with a comprehensive and efficient framework for improving cooperation on economic crimes. The usual method for handling requests for assistance in criminal matters between countries is either through an MLAT or an extradition treaty. There is no extradition treaty between the United States and China, and the 2001 MLAT does not ade-

¹⁵² United Nations Convention Against Corruption, *supra* note 58, at art. 4.

¹⁵³ Since 2000, requests for the United States to provide MLA have increased by almost eighty-five percent, and the OIA has more than 12,000 pending U.S. requests for MLA and extradition. DEP'T OF JUSTICE, CRIM. DIVISION, PERFORMANCE BUDGET: FY 2017 PRESIDENT'S BUDGET 10, 224 (2016). While most of these requests are carried out through bilateral MLATs, these numbers reveal the need for an effective framework to avoid this backlog.

¹⁵⁴ MacCormack, *supra* note 71, at 468, 472. *See also supra* Section II.A.

quately address specific concerns associated with cross-border corruption cases or ensure that U.S. legal and humanitarian concerns will be respected.¹⁵⁵ For these reasons, China has chosen to subvert international law to return these economic fugitives to Chinese territory to face prosecution, essentially circumventing the lack of extradition treaty. To address the concerns of both the United States and China and increase cooperation on economic crimes, a revised MLAT is needed.

This new agreement must incorporate certain terms to reach these goals. First, the agreement should be narrowly tailored to focus on economic crimes. This will help ensure that the interests of both parties are protected by keeping the agreement focused on a small selection of crimes that both countries have agreed to criminalize. Second, the treaty should determine a comprehensive asset-sharing regime, in place of reliance on current laws. Third, the revised MLAT should outline a process for requesting assistance, which will ensure that China receives the help it desires in a timely manner and protect the United States' interest in ensuring that the accusation is reasonable. This will increase the consistency and predictability with which assets are shared and will help both countries make accurate determinations about the resources that should be put into each prosecution.

A. *Crimes Covered*

The 2001 MLAT covers “investigations, . . . prosecutions, and . . . proceedings related to criminal matters.”¹⁵⁶ While the broad coverage of the agreement may appear helpful in allowing the required assistance, it has proved merely to limit the amount of assistance required by the agreement.¹⁵⁷ Because of the broad array of offenses, the treaty had to give more flexibility in the types of evidence that could be requested and the mechanisms by which such evidence could be obtained, which in turn weakened the treaty. Under the revised U.S.-China MLAT, a limited number of crimes should be covered, which will allow for a more narrowly tailored treaty. Stronger language and less flexibility will apply these crimes. The revised MLAT should bor-

¹⁵⁵ See *supra* Part II.

¹⁵⁶ Agreement on Mutual Legal Assistance in Criminal Matters, China-U.S., *supra* note 53, at art. 1(1).

¹⁵⁷ See *supra* Section II.A. There are no provisions describing the specifics of the process for sharing evidence, there are broad exceptions allowing countries to refuse to provide assistance, and there are no prescriptive measures for asset sharing, although the agreement does contemplate that asset sharing may occur. See *supra* Part II.

row the comprehensive list of offenses for corruption and related economic crimes already provided in the UNCAC.¹⁵⁸

There are several reasons why using the UNCAC list of offenses in the revised MLAT is preferable. First, the United States and China, as signatories to the UNCAC, have committed to criminalizing the mandatory offenses.¹⁵⁹ Thus, it will be easy for the countries to share information on these crimes, recognizing that they have already criminalized these behaviors in their national laws to comply with the UNCAC. Second, the UNCAC provisions on economic crimes related to corruption are comprehensive and include details about the intent and participation elements of the crime, making it easy for countries to implement national legislation.¹⁶⁰ This will also add to the consistency of the criminalized behavior between the United States and China.

Third, the UNCAC contains a comprehensive list of internationally recognized corruption-related and economic crimes such that it seems unnecessary to add crimes to the list. The UNCAC criminalizes bribery of public officials, including both the gift and acceptance of the bribe and including bribery of foreign public officials and officials of international organizations.¹⁶¹ It also criminalizes embezzlement and misappropriation of funds by public officials.¹⁶² The UNCAC further includes mandatory provisions on money laundering,¹⁶³ participation in the crime as an accomplice,¹⁶⁴ liability of legal persons,¹⁶⁵ and obstruction of justice.¹⁶⁶ These same crimes should be included in the revised MLAT on economic crimes between the United States and China because these crimes are already recognized as corruption offenses and criminalized by both countries.

B. Asset Sharing

One of the biggest problems with the UNCAC and the 2001 MLAT is the lack of a concrete settlement procedure for seized assets.

¹⁵⁸ The covered crimes are bribery, embezzlement, money laundering, participation, and obstruction of justice. United Nations Convention Against Corruption, *supra* note 58, at arts. 15–17, 23, 25, 27(1).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at arts. 27(1), 28.

¹⁶¹ *Id.* at arts. 15, 16.

¹⁶² *Id.* at arts. 17, 22.

¹⁶³ *Id.* at art. 23.

¹⁶⁴ *Id.* at art. 27(1).

¹⁶⁵ *Id.* at art. 26.

¹⁶⁶ *Id.* at art. 25.

Although both treaties mention sharing forfeited assets, these provisions are broadly written and do not include specific guidance that can be applied by a country beforehand to determine what they may expect to recover from participating in MLA for corruption cases.¹⁶⁷ For example, Article 16 of the 2001 MLAT generally refers to the fact that asset sharing may be available but does not specifically require that either country provide help in such proceedings or guarantee that assets will be shared if they are recovered.¹⁶⁸ The UNCAC, while allowing for asset recovery and sharing, does not specify a mechanism by which assets may be shared at the end of an investigation.¹⁶⁹ U.S. law allows for assets to be shared with foreign countries when they are recovered during a U.S. investigation, but the determination is only made at the end of the case and is based on the United States' perception of how much assistance the foreign country provided.¹⁷⁰

While it may seem that assistance should be given for the sake of enforcing the law, corruption cases are some of the most time- and resource-intensive investigations to undertake, even when done efficiently. However, they frequently result in the recovery of stolen assets or payment of fines, which can help offset some of the costs of the investigations. The revised MLAT should include a provision that allows either country to understand and estimate the value of the assets that it can expect to recover at the end of proceedings to facilitate greater cooperation between the countries. Predetermining the terms of asset sharing will result in greater incentives for both countries to cooperate because they will be able to estimate their gains and manage their costs from the beginning. Because of the ease with which assets can be converted into real property or other, less divisible assets, the asset-sharing arrangement should also consider the steps to be taken in a situation where the assets cannot be easily sold or split between the two countries in their current state, such as when they have been converted into real property or a shell corporation.

¹⁶⁷ See *id.* at arts. 51–58; Agreement on Mutual Legal Assistance in Criminal Matters, China-U.S., *supra* note 53, at art. 16.

¹⁶⁸ See Agreement on Mutual Legal Assistance in Criminal Matters, China-U.S., *supra* note 53, at art. 16.

¹⁶⁹ See United Nations Convention Against Corruption, *supra* note 58, at arts. 55, 57.

¹⁷⁰ See JEAN-PIERRE BRUN ET AL., WORLD BANK & UNODC, ASSET RECOVERY HANDBOOK: A GUIDE FOR PRACTITIONERS 186 n.278 (2011). Fifty to eighty percent of “confiscated assets” are returned where the foreign country “provided essential assistance,” forty to fifty percent is returned where the foreign country provided “major assistance,” and up to forty percent is returned where the foreign country provided “facilitating assistance.” *Id.*

C. *MLA Process Under the Revised MLAT*

Under the revised MLAT between the United States and China, several other aspects of MLA should be adjusted to accommodate the specific concerns of economic crimes and to formalize the process by which MLA requests are sent, received, and answered. The revised MLAT should incorporate these specific steps for MLA, including the request phase, the provision of assistance, the obligation to prosecute or extradite, the judicial proceedings, the remedy implemented if the party is found guilty, and asset sharing.

1. *Step 1: Request*

The information to be included in a request should be carefully outlined in the revised MLAT to avoid confusion and to make clear what is expected in a request. Both the UNCAC and the 2001 MLAT specify information that should be included in the request: biographical information, a description of the location and details of the person to be served, the evidence to be obtained, the relation of the requested information or evidence to the alleged offense, and the procedure for obtaining the information.¹⁷¹ These provisions should be maintained, and another provision should be added to expedite the requests made for these economic crimes.

The number of MLA requests to the United States has nearly doubled since 2000, causing a significant backlog.¹⁷² This creates special problems in economic crime cases because of the speed with which assets can be converted to real or personal property, hidden in foreign bank accounts or shell companies, or spread among various small investments.¹⁷³ The revised MLAT should have a provision that places a time limit on the response to an MLA request to address Chinese concerns with losing the assets, as they are quickly converted when laundered. The time limit may be met through greater communication between the parties before the request is formally made, to ensure that the request has no flaws, and through quicker processing of the request to the magistrate.¹⁷⁴ The revised MLAT should also re-

171 See Agreement on Mutual Legal Assistance in Criminal Matters, China-U.S., *supra* note 53, at art. 4(2); United Nations Convention Against Corruption, *supra* note 58, at art. 46(15).

172 DEP'T OF JUSTICE, CRIMINAL DIV., PERFORMANCE BUDGET: FY 2017 PRESIDENT'S BUDGET 23 (2016).

173 See Gurney et al., *supra* note 3.

174 Some have suggested that the MLAT process could be streamlined by having a single office of prosecutors and magistrates whose sole job is to respond to the requests for MLA. See Swire & Hemmings, *supra* note 81, at 718–20. Thus, the prosecutors would receive the requests and the magistrates could process them within the confines of one office, eliminating the current

quire that the request include details showing the likelihood that the person being targeted committed the crime, similar to the probable cause required for an arrest warrant. While it seems unfair to require too many details (as much of the proof may be in the requested state, hence the need for MLA), it does not seem unreasonable to require the requesting state to show that there is at least probable cause that the target has engaged in the corrupt practice.

Thus, the relevant articles should require the requesting party to produce all the information indicated in the 2001 MLAT and the UNCAC; place a limit on the amount of the time the requested party has to consider whether to accept the request; and require that the requesting party meet a probable cause standard of proof in making their request. In this manner, the requests will be answered more quickly while maintaining an evidentiary standard to indicate to the requested state that the request is not being made for an improper purpose.

2. *Step 2: Provision of Assistance*

Unlike Article 46 of the UNCAC or Article 3 of the 2001 MLAT, this revised MLAT should permit very limited exceptions for either country to refuse to provide MLA.¹⁷⁵ The World Bank has noted that provisions in MLATs that allow for discretion in refusing to grant MLA requests have contributed to delays in MLA request processing and caused many requests to be turned away, even if only for purely economic reasons.¹⁷⁶ Under the 2001 MLAT and the UNCAC, the provisions for discretionary refusal are too broad.¹⁷⁷ Under the revised MLAT, the ability to refuse to answer a request should be limited to situations in which (1) the requested party determines that probable cause has not been shown; (2) the request does not conform with the provisions of the article on making requests (i.e., there is something faulty about the manner in which the request was made or the information contained in the request); or (3) the request does not fall

three-step process from the OIA to the prosecutor to the magistrate. *See id.* On the other end, this would also allow for a direct response to the requesting country rather than going back from the magistrate to the prosecutor to the OIA. This would further streamline the process. *See id.* This Note will not address these policy considerations about how the United States should speed up its response time.

¹⁷⁵ *See* Agreement on Mutual Legal Assistance in Criminal Matters, China-U.S., *supra* note 53, at art. 3; United Nations Convention Against Corruption, *supra* note 58, at art. 46(21).

¹⁷⁶ *See* STEPHENSON ET AL., *supra* note 48, at 83–84.

¹⁷⁷ *See, e.g.*, Agreement on Mutual Legal Assistance in Criminal Matters, China-U.S., *supra* note 53, at art. 3; United Nations Convention Against Corruption, *supra* note 58, at art. 46(21).

under the subject matter jurisdiction of the treaty. Limiting the options for the requested country to refuse the request will create more certainty in applications by the requesting state and will ensure that requests will not be refused on purely discretionary grounds.¹⁷⁸ This will increase trust and reliability, which are key to a successful MLA relationship.

3. *Step 3: Prosecution or Extradition*

As part of the provision of MLA under the revised MLAT, the requested state must decide whether it will prosecute the case itself or assist in a prosecution in the requesting state. While the requested state may not refuse a request on discretionary grounds, it will have the ability to limit its participation in the case to extradition and provision of relevant evidence. This allows the requested state some flexibility in cases where the requested state wishes to limit the resources expended on the case. This should create some leeway in cases in which a country has the suspect in custody but does not wish to initiate the prosecution itself. However, in cases in which a country declines to prosecute, that country will have to commit to sending the fugitive back to the requesting country for prosecution. This reserves some discretion to a country that may not wish to extradite a fugitive to the requesting state to decide to prosecute the case it. Although this grants all the discretion to the country to which the fugitive has fled, the treaty should allow the countries to negotiate to determine the best place for prosecution in any given case.

In the current state of affairs, this provision may be important to serve the interests of both the United States and China. The United States may decide that prosecution in the United States is the best course of action where they are concerned about potential mistreatment or due process violations. China, on the other hand, will be able to ensure that fugitives in the United States will either be prosecuted and the assets returned or the fugitives will be returned to China to face prosecution for their crimes. Because China and the United States have no official extradition treaty, the Department of State makes its own decisions about when and whether to return requested fugitives to China, with no appeal process for a state whose request for extradition has been denied.¹⁷⁹ This new agreement could include an extradition article that would be implemented when a country chooses to extradite rather than prosecute an individual. In these

¹⁷⁸ See STEPHENSON ET AL., *supra* note 48, at 83–84.

¹⁷⁹ BASSIOUNI, *supra* note 129, at 216.

cases, the normal process for extradition under a treaty would occur and judges would oversee decisions by the Department of State.¹⁸⁰ This could be particularly important where human rights concerns may be implicated.¹⁸¹

4. *Step 4: Judicial Proceedings*

After it is determined where the defendant will be prosecuted, judicial proceedings should occur in compliance with the rules and regulations of the prosecuting state and in accordance with the substantive laws of that state. Because of the differences in the conduct of judicial proceedings in the United States and China, the proposed agreement should not attempt to offer specific guidance on this point. Once the case has proceeded according to the rules and regulations of the state of prosecution, the case will continue to the remedy implementation phase.

5. *Step 5: Remedy Implemented*

The revised MLAT should contain provisions addressing the implementation of the remedy in the case of judgment rendered against the accused. The questions this provision must address are (1) where a sentence should be served and (2) to whom payment of fines or other forfeiture should go initially. For instance, it may make the most sense for the penalties to be paid and implemented in the country in which the case is prosecuted or in the home state of the convict. After the case finishes, the parties can turn to the asset-sharing portion of the agreement to address the final dispersal of the illicit proceeds of the crime.

6. *Step 6: Asset Freezing and Sharing*

This provision is discussed above.¹⁸² The revised MLAT should describe the mechanism by which assets should be shared among the parties after a judicial proceeding has occurred. In addition to specifying the dispersal of the assets after the case has closed and the money formally handed over, this provision should allow for freezing of assets as soon as the request for MLA has been approved. This will help alleviate concerns about the conversion of money into less accessible assets, such as real property and shell corporations, and ensure that

180 MacCormack, *supra* note 71, at 449.

181 See, e.g., Tanner, *supra* note 91, at 155.

182 See *supra* Section IV.B.

after the case is over, the assets will be readily available for sharing between the parties.¹⁸³

CONCLUSION

The current MLA regime between the United States and China, including the 2001 MLAT and the UNCAC, is not a viable framework for the countries to cooperate on economic crimes.¹⁸⁴ This can be seen by the refusal of both countries to operate within the current legal framework.¹⁸⁵ In response to the United States' refusal to extradite wanted criminals to China or cooperate in Chinese-led criminal prosecutions, China has sent government agents into the United States to retrieve those wanted officials.¹⁸⁶ This presents several problems for the United States. First, these Chinese officials are violating U.S. territorial sovereignty.¹⁸⁷ Second, the United States has valid concerns about the accuracy of the allegations against these economic fugitives.¹⁸⁸ Third, the United States has chosen not to have an extradition treaty with China because of concerns about the criminal justice system.¹⁸⁹ To address the concerns of the United States and the interests of China in prosecuting corrupt officials and recovering stolen assets, the two countries should implement a revised bilateral MLAT.¹⁹⁰

Creating such a treaty could have further important implications for the future relations between the countries. While the treaty would be limited to cooperation on economic crimes, if the process goes well, it could potentially influence MLA for other criminal and civil cases. In addition, by cooperating with China where possible, the United States may have more influence on the application and procedure of the Chinese criminal justice system.¹⁹¹ To obtain MLA from the United States, China will have to meet certain requirements for providing proof and acquiring evidence. These types of requirements may assist China in the equitable application of all its laws and improve several of the concerns the United States has with the current criminal justice system. Finally, cooperating on these issues may lead to im-

183 STEPHENSON ET AL., *supra* note 48, at 9.

184 *See supra* Part II.

185 *See supra* Section II.B.

186 *See supra* Part I.

187 *Id.*

188 *Id.*

189 *Id.*

190 *See supra* Section II.C.

191 *See supra* Section IV.C.

provement in other areas of the U.S.-China relationship, which would have a lasting impact on both countries.

ANNEX I

The follow diagram illustrates the suggested process for MLA requests under the proposed revised MLAT.

